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IN THE

Supreme Court of the United States

October Term, 1970

No.

JOHN ROSELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, John Roselli, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming a judgment of the United States District Court for the Central District of California, dated February 3, 1969, convicting him of violations of 18 U.S.C. §§ 371 (one count), 1952 (one count) and 2314 (three counts), and of 26 U.S.C. § 7206(1) (one count).

Opinion Below

The opinion of the United States Court of Appeals for the Ninth Circuit, not yet officially reported, is reprinted herein as Appendix A. That opinion, in dealing with one of the issues to be raised in this Petition, adopted a portion of the

opinion in *United States* v. *Sacco*, 428 F.2d 264 (9th Cir. 1970). The pertinent portion of that opinion is reprinted herein as Appendix B.

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 28, 1970. A timely petition for rehearing and suggestion for rehearing en banc was denied on October 30, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

18 U.S.C. § 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> • • •

18 U.S.C. § 1952:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the laws of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) • • •

18 U.S.C. § 2314:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud;

• • •

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

• • •

California Penal Code § 332:

Every person who by the game of "three-card monte," so-called, or any other game, device, sleight of hand, pretensions to fortune telling, trick or other means whatever, by use of cards or other implements or instruments, or while betting on sides or hands of any such play or game, fraudulently obtains from another person money or property of any description, shall be punished as in case of larceny of property of like value.

Questions Presented

1. Whether a defendant's knowledge of the federal jurisdictional element of the crimes defined by 18 U.S.C. § 1952 and 18 U.S.C. § 2314 must be proved by the Government in a prosecution (a) for a conspiracy to violate those statutes and (b) for a substantive violation of those statutes.

2. Whether the term "any business enterprise involving gambling," as used in 18 U.S.C. § 1952, was intended by Congress to apply to a scheme involving the fraudulent obtaining of money by means of cheating at the card game known as "gin rummy."

3. Whether, despite the wording of Rule 41(e) of the Federal Rules of Criminal Procedure, a district judge has the discretionary power to postpone until after trial a defendant's motion to suppress evidence on the ground that it was obtained by illegal electronic surveillance.

4. Whether the guidelines established by this Court in *Alderman* v. *United States*, 394 U.S. 165 (1969), were violated when, at a hearing to determine if the Government's case had been tainted by its illegal eavesdropping activities, the trial court: (a) refused to permit petitioner to inquire into the possible existence of illegal eavesdrops other than those which Government counsel had represented were all there were; (b) cut off, by denying defense requests for production of certain persons and documents, petitioner's attempt to connect the illegal surveillance with the Government's evidence; and (c) placed upon petitioner the burden of showing such a connection.

Statement of the Case

Petitioner was tried in the United States District Court for the Central District of California upon an indictment charging him, and three others, with violations of 18 U.S.C. §§ 371, 1952 and 2314, and of 26 U.S.C. § 7206(1). Briefly stated, the proof at trial was as follows:

The Friars Club in Beverly Hills, California, is a private social club which offers a number of facilities to its members, including rooms in which card games may be played. For a period of four years, commencing in the summer of 1962, the club was the scene of a scheme to cheat various of its members or guests out of large sums of money bet on games of gin rummy. Certain members of the conspiracy would induce the victims to play gin rummy for high stakes and would then learn of the victims' hands by receiving electronic signals from other conspirators who were stationed above the ceiling over the playing area and were observing the play of the hands through peekholes. The sums obtained by this fraudulent scheme were large.

The Government sought to put petitioner into the conspiracy in a number of ways. It produced evidence that he was a member of the club and was present at a number of the rigged games, although not as a player. It showed that he knew the other conspirators. Evidence was introduced that the victim of one of the games gave defendant Teitelbaum a check for $10,000 made out to one J. Martinez, a fictitious name. This same check was later given by defendant Friedman in Las Vegas to his secretary, together with instructions that she cash it and give the proceeds to petitioner. She did so. Defense testimony that this sum was not petitioner's, but was given to him by Friedman so that

petitioner could pay one of Friedman's gambling debts was apparently not believed by the jury.

Additional testimony against petitioner was given by one Seach, a member of the conspiracy, who "peeked" the earlier games before going to prison on a burglary conviction in mid-1963. Seach testified that in a conversation he had with Friedman and petitioner, he (Seach) mentioned that he had developed a new peeking device. Friedman suggested that he leave it, and he would receive a share of the profits while he was in prison. Seach declined, saying that it was hard enough to get his share even when he was "there," and petitioner then said: "From now on I'm going to be there." Seach also testified that Friedman told him that petitioner was a partner in the cheating scheme and was getting a share of the profits.

On the basis of this testimony, petitioner was convicted of participation in the cheating conspiracy. He was also convicted under one count of violating 18 U.S.C. § 1952 and three counts of violating 18 U.S.C. § 2314—all four counts being based upon various facets of the interstate transportation of the Martinez check and the funds it represented. Finally, petitioner was convicted under 26 U.S.C. § 7206(1) for failure to report as income the $10,000 given to him by Friedman's secretary.

The Government introduced no evidence that petitioner knew of the interstate transportation of the Martinez check or the fact of its cashing in Las Vegas for ultimate collection out of state.

Reasons for Granting the Writ

1. Petitioner was convicted of a conspiracy to violate 18 U.S.C. §§ 1952 and 2314, and of substantive violations of those statutes.[1] On appeal, he argued, as to each crime, that there had been no proof that he knew of the existence of the federal jurisdictional element of each of the substantive crimes.[2] In affirming petitioner's conviction, the Ninth Circuit held that:

> [T]he knowing use of interstate facilities is not an essential element of either the substantive offenses or the conspiracy to commit them . . . . (Emphasis added)

By so holding, the court below put itself in conflict with the view of a number of other Circuit Courts which have passed upon these two statutes and other provisions virtually indistinguishable from them. The pertinent cases from other Circuits are noted in the margin.[3] The extent to which

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[1] He was also convicted of a violation of 26 U.S.C. § 7206(1). Since, as a practical matter, that conviction depended upon his conviction for the other crimes and should fall if they fall, it is not specifically dealt with in this petition.

[2] That is, that: (a) under § 1952, he knew of the interstate travel or the use of an interstate facility; and (b) under § 2314, he knew of the interstate transportation of the illegally obtained securities or money.

[3] As to the requirement of such knowledge where the substantive crimes are charged, see: *United States* v. *Hawthorne*, 356 F.2d 740, 742 (4th Cir.), *cert. denied*, 384 U.S. 908 (1966) (". . . we think it sufficient under section 1952 that the defendant knowingly caused to be transmitted interstate . . . proceeds of a gambling enterprise which was unalwful under the Indiana statute"); *South* v. *United States*, 412 F.2d 697, 699 (5th Cir. 1969) (conviction under § 1952 reversed because of absence of proof that defendant had used an interstate facility, although it was clear that his co-conspirators had); *United States* v. *Barnes*, 383 F.2d 287 (6th Cir.), *cert. denied*, 389 U.S. 1090

those Circuits appear to require proof of knowledge under some statutes but not under others, and the proliferation of the statutes involving an interstate element, combine to form a persuasive argument for the granting of the writ.

Even more important is the fact that the ruling of the Ninth Circuit flies in the face of this Court's opinion in *Pereira* v. *United States*, 347 U.S. 1 (1954), a case which the Ninth Circuit stated had "assumed the need for such proof [of knowledge], but apparently without consideration of the problem."

The numerous times, in *Pereira*, that this Court referred to the knowledge requirement refute the claim, made below, that the problem was "apparently" not considered. Thus,

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(1967) (conviction under section 1952 reversed as to those in the gambling conspiracy who were not shown to have been aware that gambling supplies were being brought in to them from another state); *United States* v. *Zizzo*, 338 F.2d 577, 580 (7th Cir. 1964), *cert. denied*, 381 U.S. 915 (1965): See especially *United States* v. *Miller*, 379 F.2d 483, 487 (7th Cir.), *cert. denied*, 389 U.S. 930 (1967). There, in a section 1952 case mistakenly claimed by Ninth Circuit to support its view herein, the court stated: "It is undenied that defendants knew that the tickers were interstate facilities and knowingly retained them in their establishments. Such knowledge suffices to satisfy the jurisdictional portion of this statute." But see, e.g.: *United States* v. *Blassingame*, F.2d (2d Cir. 1970) (substantive violation of § 1343); *Hulsey* v. *United States*, 369 F.2d 284, 287 (8th Cir. 1966) (substantive violation of § 2314).

As to the requirement of such knowledge in conspiracy prosecutions, see: *United States* v. *Edwards*, 366 F.2d 853, 869 (2d Cir. 1966) ("We find the instructions on this point to be unmistakably clear and correct. Judge Wyatt instructed the jury that it could convict only if it found beyond a reasonable doubt that the conspiracy embraced the concept that the stolen securities 'shall cross state lines or move to foreign countries.'"); *United States* v. *Barnes*, *supra*; *United States* v. *Fellabaum*, 408 F.2d 220, 223-24 (7th Cir. 1969). See also: *Harms* v. *United States*, 272 F.2d 478 (4th Cir. 1959) (conspiracy to violate the Mann Act); *Nassif* v. *United States*, 370 F.2d 147, 152 (8th Cir. 1966) (conspiracy to steal merchandise from interstate commerce; "Knowledge of the interstate character of the goods constitutes a prerequisite of proof.").

at pages 8-9, dealing with the mail fraud statute (18 U.S.C. § 1341),[4] this Court stated that:

> When one does an act *with knowledge that the use of the mails will follow* in the ordinary course of business, or *where such use can reasonably be foreseen*, even though not actually intended, then he "causes" the mails to be used. (Emphasis added).[5]

This was surely no off-hand remark; this Court has made similar observations in other cases. See *Ingram* v. *United States*, 360 U.S. 672 (1959), which cited *Pereira* with approval. See also: *Pinkerton* v. *United States*, 328 U.S. 640 (1946), where Mr. Justice Douglas, speaking for this Court, stated that liability of a conspirator for substantive crimes committed by others in furtherance of the conspiracy might not exist where the substantive crime "was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." We submit that this Court should not permit to go uncorrected a ruling, such as that of the court below, which so completely turns its back on

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[4] And reaching a conclusion directly contrary to that reached by the Second Circuit with respect to the analogous wire fraud statute (18 U.S.C. § 1343). See *United States* v. *Blassingame*, *supra* note 3, on which the Ninth Circuit relied in rejecting petitioner's argument.

[5] The following statements occur elsewhere in the opinion: "It is not necessary that an agreement to use the mails or transport stolen property exists from the inception of the scheme to defraud. If there was such an agreement at any time, it is sufficient." (Court's opinion, page 12); "The elements of the offense under the Mail Fraud Statute are (1) a scheme to defraud which (2) reasonably contemplates the use of the mails, and (3) use of the mails in furtherance of the plan." (Dissenting opinion by Justices Minton, Black and Douglas, page 14); "There is no evidence to establish that he [a co-defendant] could reasonably have expected that the mails would be used in carrying out the scheme." (*Ibid*).

what this Court has said on the important issue we raise here.

Finally, this Court recently granted certiorari in the case of *United States* v. *Perez*, F.2d (2d Cir. 1970), to determine whether a conviction may stand in the absence of proof of the federal jursidictional element of the crime and the constitutionality of a federal statute permitting such a conviction. The instant case, presenting a related issue, merits review as well.

The court below has announced a rule which is in conflict with opinions of other Circuits and of this Court as well. The issue involved is one of importance to the administration of federal criminal justice. See, e.g., *United States* v. *Pereira, supra*, at 3. The fact that various Circuits require proof of knowledge under some statutes but not under others, or require such proof in conspiracy prosecutions but not in prosecutions for the substantive offenses themselves breeds a confusion harmful not only to the accused but to the Government.[6] If the opinion of the Ninth Circuit incorrectly states the present rule on the issue, this Court should correct it, lest other courts be misled. If, on the other hand, that opinion correctly states the present rule, then this Court should change the rule, for good law has to start somewhere.

2. The court below has placed its stamp of approval upon a Government construction of 18 U.S.C. § 1952 as broad and

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[6] See, for example, the unreported opinion in *United States* v. *Andrew W. Clarke, et al.*, Crim. No. 4379, E.D. Va. (Alexandria Division) (March 20, 1967). There, in a prosecution brought under 18 U.S.C. § 1952, the trial court, believing itself required to do so by what it termed "established" rules of law, ruled that proof of a defendant's knowledge of the use of an interstate facility was essential and entered a judgment of acquittal because such proof was lacking.

expansive as the defense construction of that same statute was narrow and constrictive before being rejected by this Court in *United States* v. *Nardello*, 393 U.S. 286 (1969).

Section 1952 penalizes, among other things, interstate travel or the use of an interstate facility in connection with an activity made unlawful by the State in which it is committed. The section defines what is meant by an "unlawful activity," and includes, in the brief list which it creates, "any business enterprise involving gambling." The state statute around which the present prosecution revolved was California Penal Code § 332, which prohibits cheating at cards for money and equates such cheating with larceny. The particular card game involved here was gin rummy.

Both in the trial court and in the Ninth Circuit petitioner argued that California Penal Code § 332 defined a crime which was essentially larceny or fraud and thus was never intended by Congress to come within the ambit of the "gambling offense" provision of section 1952. A clear indication of Congressional intent may be found in the fact that Congress rejected, during the same session in which § 1952 was passed, a similar bill which would have included "criminal fraud" and "false pretenses" among the state crimes covered by the statute.[7]

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[7] See Senate Bill 710, 87th Cong., 1st Sess. In testifying in support of Senate Bill 1653 (now § 1952), Assistant Attorney General Herbert Miller, of the Department of Justice's Criminal Division stated:

> This bill as it now stands is really aimed at what we call organized crime today. When you get off into the field of criminal fraud and false pretenses, there is a rather substantial expansion of the crimes committed, because these crimes would be those which either violated the laws of the United States or State laws, and I frankly would not want to expand our jurisdiction to the point where we were overcommitted from an investigative and prospective standpoint . . . .

But logic even more than legislative history supports petitioner's position. In *Nardello, supra*, this Court rejected an interpretation of § 1952 which would have caused the applicability of the statute in any given case to depend upon the name affixed to a crime by a particular state. The essence of the case was stated thusly, at page 295:

> We can discern no reason why Congress would wish to have § 1952 aid local law enforcement efforts in . . . [one State] but to deny that aid to . . . [another] when both States have statutes covering the same offense. We therefore conclude that the inquiry is not the manner in which States classify their criminal prohibitions but whether the particular State involved prohibits the extortionate activity charged.

Those words could well have been written for this very case.

California has chosen to penalize cheating at cards for money by means of a special statute—Penal Code § 332—placed in an article dealing with "Gaming." Those who cheat at cards in other states, however, may find the indictments that do them in drawn under a different and far more general type of statute—one covering fraud or false pretenses.[8] Should section 1952 be held to aid local law enforcement in California and other states with similar special statutes but not in states where essentially the same type of conduct is prohibited by a far more generally worded statute? And if it be argued that section 1952 applies to all such conduct, however

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Now, fraud, as a practical matter is not normally the type of crime that you associate with organized crime.

See Hearings of the Senate Committee on the Judiciary Concerning Organized Crime and Racketeering, 87th Cong., 1st Sess., page 113.

[8] See, e.g., New York Penal Law § 155.05, found in the Article entitled "Larceny," which would cover the type of conduct alleged in the instant case.

classified, this Court should carefully scrutinize an interpretation which stretches that statute's scope far beyond what its proponents and Congress itself intended.

We submit that this case raises a question of statutory construction meriting this Court's review every bit as much as did the question raised in the *Nardello* case.

3. Prior to trial, the Government disclosed that it had subjected petitioner to illegal electronic surveillance. Petitioner moved, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, to suppress such evidence as may have been obtained by that illegal eavesdropping, and requested a pretrial hearing on the motion. Over objection, the court postponed the hearing until after completion of the trial. This was error deserving the attention of this Court.

Rule 41(e) provides in part:

> The motion [to suppress evidence] shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds of the motion, but the court in its discretion may entertain the motion at the trial or hearing.

Nowhere does the Rule provide for discretion on the part of the judge to postpone the hearing until after trial. Compelling reasons dictate that such a hearing should be held before the trial; the reasons advanced, explicitly or implicitly, by the Ninth Circuit in justifying the procedure adopted by the trial court merit scrutiny by this Court.* We deal with these two propositions in reverse order.

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* In treating this issue, the Ninth Circuit adopted its opinion in *United States* v. *Sacco*, 428 F.2d 264 (9th Cir. 1970). The adopted portion of that opinion is reprinted herein as Appendix B.

Noting first that other district courts had adopted the procedure complained of,[10] the court below stated that where illegal electronic surveillance first came to the attention of the defense after trial, this Court has stated that a post-trial hearing is the proper remedy.[11] That other courts may have adopted a similar procedure does not, we submit, prove their power to do so, and the fact that this Court has ordered post-trial hearings in the cases cited by the court below was born of the necessity of the situation—the trial had already been completed when the need for a hearing was first discovered. We submit that the principal reason for the Government's insistence that the hearing be held post-trial is based upon its reluctance to provide the discovery which such a hearing would involve.[12] This, indeed, is a slender reed of an argument, especially when advanced by a wrongdoer.

There are compelling reasons for holding the hearing before trial, as Rule 41(e) requires. Judge Learned Hand once remarked that "as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death." To postpone a hearing on a motion to suppress evidence is

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[10] See, e.g., *United States* v. *Birrell*, 269 F. Supp. 716 (S.D.N.Y. 1967)..

[11] The cases relied upon by the Ninth Circuit were: *Desist* v. *United States*, 394 U.S. 244 (1969); *Kolod* v. *United States*, 390 U.S. 136, *modified on rehearing sub nom. Alderman* v. *United States*, 394 U.S. 165 (1969); *Hoffa* v. *United States*, 387 U.S. 231 (1967).

[12] Other reasons advanced included the Government's assertion that a pretrial hearing might be of "considerable duration" and would be made unnecessary if petitioner were acquitted. The hearing turned out to be relatively short, whereas the trial took approximately six months. The Government was also fearful that the publicity surrounding a pre-trial hearing would prejudice petitioner's right to a fair trial. That hearing, however, could have been a closed one had petitioner so desired.

to require a defendant to endure the hardship of a trial which may prove to be an abortive one. The Fourth Amendment is only half a shield if, consistent with it, a man may be made to bear the burdens of a protracted trial and the stigma of a conviction before getting the chance to vindicate his rights. This Court should take the opportunity now offered it to prevent such occurrences. In short, we submit that trial courts are without power to postpone suppression hearings until after conviction. If such power they have, it should be exercised only pursuant to clear guidelines—guidelines which should be laid down by this Court in the exercise of its supervisory powers.

4. Petitioner was subjected to illegal electronic surveillance at his Las Vegas and Los Angeles apartments during a period covered by the indictment. Among the items illegally overheard were the fact of his membership in the Friars club and his association with other defendants in the case. Much conversation about gambling was also overheard, as well as about his comings and goings. The hearing which was held to determine whether the Government's case against petitioner was tainted failed to conform to the standards set by this Court in *Alderman* v. *United States*, 394 U.S. 165 (1969),[13] and was not calculated to resolve the issue.

The hearing suffered from many infirmities, but the principal ones were these:

First, the trial judge accepted Government counsel's representations that all the logs of petitioner's conversa-

[13] At the time of the hearing, *Alderman* had not yet been decided, but its holding was forecast in an earlier ruling in the same case, *sub nom. Kolod* v. *United States*, 390 U.S. 136 (1968).

tions had been turned over to the defense and did so in the absence of sworn testimony of the custodian of such records that the search for them had been an adequate one. Moreover, compounding the error, the court forbade counsel to question F.B.I. agents about illegal "bugs" in various Las Vegas locations which, it was known, petitioner frequented. Thus, the conduct of the hearing did not assure that petitioner had all of the material to which he was entitled.

Second, the trial court cut off defense counsel's attempt to connect the illegal surveillance with the Government's evidence. The court: denied requests for the production of the agents who had monitored petitioner's conversations, although it was shown that they could have disseminated information about him; refused requests for production of memoranda prepared by the F.B.I. for use by the prosecution; declined to order produced in court the F.B.I. case files on petitioner so that the defense might determine the extent to which they contained the fruits of electronic surveillance.[14] Thus, the conduct of the hearing did not enable petitioner to show the nexus between the eavesdropping and the Government's proof.

Third, the trial court, in denying petitioner's motion, erroneously shifted to him the burden of proof which properly belonged to the Government. It stated (Post-trial Hearing, p. 263):

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[14] Such an order was issued by the court in *United States* v. *Black*, Crim. Nos. 650-63 and 651-63 (D.D.C. Feb. 20, 1968) (unreported). There is, evidently, a significant disagreement among district courts as to how a suppression hearing should be handled so as to assure that it achieves its goal.

> I am unable to find there is substantial relevance between the material so disclosed [i.e., the eavesdrop material] and the convictions.

This holding, we submit, misstates the law. The burden ought to be on the Government to prove, beyond a reasonable doubt, that its case was free of taint. This is the burden and the test which is appropriate when the issue to be resolved is whether an accused has been harmed by the violation of one of his Constitutional rights. See, e.g., *Chapman* v. *California*, 386 U.S. 18 (1967).

We submit that the manner in which the suppression hearing was conducted in the district court inadequately protected petitioner's Fourth Amendment rights, and that this Court should consider this issue, so as to enable it to lay down appropriate guidelines for other courts to follow when conducting similar hearings.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 24,220

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN ROSELLI,
Defendant-Appellant.

No. 24,289

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MAURICE FRIEDMAN,
Defendant-Appellant.

No. 24,290

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BENJAMIN TEITELBAUM,
Defendant-Appellant.

No. 24,300

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MANUEL JACOBS,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Before: BROWNING, DUNIWAY and HUFSTEDLER, Circuit Judges. BROWNING, Circuit Judge:

Appendix A—Opinion

Appellants participated in an organized scheme to cheat for profit in card games played at the Friars Club, a private social club in Beverly Hills, California. Victims were induced to join high stake gin rummy games. Observers stationed at ceiling peekholes transmitted playing instructions to confederates in the game via electronic signaling devices.

The activity continued from the summer of 1962 to the summer of 1966. Games were "peeked" almost daily during a portion of this period. Appellants and other participants in the scheme made large profits. George Seach, an unindicted coconspirator who acted as "'peekman" from late June 1962 to early April 1963, estimated the "take" during this period at $400,000.

After a long and complex trial appellants were convicted of conspiracy to violate 18 U.S.C. § 1952 (interstate travel and use of interstate facilities in aid of racketeering enterprises) and §2314 (interstate transportation of fraudulently taken securities), and substantive violations of these sections[1] and of 26 U.S.C. § 7206 (false statements in income tax returns).

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[1] 18 U.S.C. § 1952 provides:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

"(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

Appendix A—Opinion

I

Appellants' threshold contention that their conduct did not come within the terms of 18 U.S.C. § 1952, raises two issues regarding the meaning of the statute.

Section 1952 condemns interstate travel or the use of interstate facilities in furtherance of "any unlawful activity," defined as including "any business enterprise involving gambling, liquor on which the federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States." The Government's theory is that appellants' conduct constituted a "business enterprise" within the meaning of the statute because it was a continuous course of conduct pursued for profit; and that

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"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

"(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

18 U.S.C. § 2314 provides in part:

"Whoever transports in interstate commerce any . . . securities or money, of the value of $5,000 or more, knowing the same to have been . . . taken by fraud; . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

it involved "gambling . . . offenses" in violation of California Penal Code section 332.[2]

Appellants' first argument is that section 1952 was intended to reach only forms of gambling which were within the province of organized crime at the time the statute was enacted, numbers, bookmaking, and dice, for example; and that gin rummy does not fall in this category.

It is true that section 1952 was aimed at organized crime.[3] It is also true that Congress intended to strike at those illicit activities which provide organized crime with its profits, particularly gambling.[4] But to accomplish this purpose, Congress did not choose to direct the prohibitions of section 1952 against only those persons who could be shown to be members of an organized criminal group (this much appellants concede),[5] or against only those kinds of

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[2] California Penal Code § 332 provides:

> "Every person who by the game of 'three card monte' so called, or any other game, device, slight of hand, pretensions to fortune telling, trick or other means whatever, by use of cards or other implements or instruments, or while betting on sides or hands of any such play or game, fraudulently obtains from another person money or property of any description, shall be punished as in case of larceny of property of like value."

[3] Section 1952 was one of a package of bills referred to collectively in the Senate as the Attorney General's Program to Curb Organized Crime and Racketeering (Hearings before Committee on Judiciary, U.S. Senate, 87th Cong., 1st Sess., on S. 1653-1658, S. 1665); and in the House as Legislation Relating to Organized Crime (Hearings before Committee on Judiciary of H. of Rep., 87th Cong., 1st Sess., on H.R. 468, H.R. 3021-3023, H.R. 3246, H.R. 5630, H.R. 6571-6572, H.R. 6909, H.R. 7039). The records of both hearings contain repeated assertions that all of the bills, including § 1952, were aimed at organized crime.

[4] Senate Hearings, note 3, at 11; House Hearings at 19.

[5] Appellants recognize that the statute applies to all persons and not only to persons engaged in organized crime. *United States* v. *Barnes*, 383 F.2d 287, 289 n. 2 (6th Cir. 1967). *Cf. United States* v. *Fabrisio*, 385 U.S. 263, 266-267 (1966).

gambling, liquor, narcotics, and prostitution offenses which racketeers were engaged in at the time Congress acted. The words of section 1952 are general; they contain no restriction to particular persons or to particular kinds of gambling, liquor, narcotics, and prostitution offenses.[6]

The reasons seem self-evident. It would usually be difficult, if not impossible, to prove that an individual or business was associated with or controlled by a clandestine criminal organization. It might also be difficult to prove that a particular offense was of the kind commonly engaged in by organized criminals in 1961; and, in any event, such a restriction upon the statute's coverage would provide an easy avenue for evasion through adoption of new forms and techniques of illicit trafficking. Nothing in the legislative history suggests that Congress intended prosecutors and courts to read into the Act such highly restrictive and administratively impractical exclusionary provisions. On the contrary, as we read the legislative record, Congress meant exactly what the language of section 1952 states—it deliberately chose to make the statute applicable generally, and without crippling restrictions, to any person engaged in any kind of illicit business enterprise in one of the four fields of activity specified in the statute, which ex-

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[6] When Congress wished to further restrict the categories of offenses covered by the statute it did so by express language. Thus the statute originally referred to liquor offenses generally as it now does to gambling, narcotics, and prostitution offenses; but because this was considered too broad, language was added expressly limiting the category of liquor offenses to offenses relating to liquor "on which the Federal excise tax has not been paid." S. Rep. No. 644, 87th Cong., 1st Sess., pp. 1-2. Even this language described a general field of illicit activity and did not attempt to enumerate specific offenses within that field.

perience showed to be those in which organized racketeers commonly engaged.[7]

Appellants contend that the "business enterprise" requirement was included in section 1952 for the very purpose of limiting the statute as they suggest. Concededly the purpose of the "business enterprise" restriction, like that limiting the statute to illicit activity in one of the four fields in which racketeers were commonly engaged, was to focus the statute upon organized crime. But again the technique Congress employed was that of stating the limitation in general terms applicable to organized crime but not confined to it. Thus Congress limited section 1952 to "any business enterprise" because the requirement of a continuous course of conduct for profit would ordinarily include the gambling operations of organized crime;[8] but, as we

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[7] Appellants rely heavily upon a letter written by Attorney General Robert F. Kennedy to Representative Owen Harris, which states,

> "During the formulation of the proposal we were aware that to prohibit travel in furtherance of any unlawful activity would be a very broad and vague proscription which might not reach the type of activity in which we were interested. The term 'unlawful activity' was therefore defined *to limit its application to those crimes which historically have been the forte of organized crime.*" (Emphasis added.)

However, the Attorney General immediately identified the crimes he had in mind in the same general terms employed in the statute, stating, "Those crimes include gambling, liquor, narcotics, and prostitution offenses and extortion or bribery." 107 Cong. Rec. part 12, p. 16542.

[8] *See, e.g.*, Senate Hearings at 67, 282, House Hearings at 24, 26. The Attorney General is quoted in S. Rep. No. 644, page 3, as stating:

> "The target clearly is organized crime. The travel that would be banned is travel 'in furtherance of a business enterprise' which involves gambling, liquor, narcotics, and prostitution offenses or extortions or bribery. Obviously, we are not trying to curtain the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise. . . ."

have said, there is nothing to suggest that Congress intended to go beyond the condition expressed in the statute and require either that the "business enterprise" be operated by racketeers or that it be of a specific kind in which racketeers very commonly engaged at the time the statute was enacted.

Appellants rely heavily upon the "interpretive technique" applied to the Anti-Racketeering Act of 1934 (18

In the letter quoted in note 7, the Attorney General said:

> "The type of offenses which pose such a great threat to this country due to the involvement of organized crime are those offenses which are committed regularly and as a continuous course of conduct. The term 'business enterprise involving' those offenses was used in the definition of 'unlawful activity' to connote a continuous course of conduct in gambling etc. It was not the intent to include within the reach of the statute legitimate business enterprises which may touch upon offenses such as gambling."

At the House hearings, Herbert J. Miller, Criminal Division of the Department of Justice, testified:

> "The use of the term 'business enterprise' limits the application of this section to a continuous and organized course of conduct in these activities, and therefore, exempts casual or occasional travel which is not directly related to such a 'business enterprise.'"

In summarizing the bill on the floor, Senator Eastland stated simply, "The use of the term 'business enterprise' requires that the activity be a continuous course of conduct." 107 Cong. Rec. part 10, p. 13943. To the same effect see H.R. Rep. No. 966, 2 U.S. Code Cong. & Admin. News, 87th Cong., 1st Sess., 1961, p 2666.

See United States v. *Brennan*, 394 F.2d 151, 153 (2d Cir. 1968). *See also Rewis* v. *United States*, 418 F.2d 1218 (5th Cir. 1969), where the court reversed the convictions of two defendants who did nothing more than cross a state line to place bets but affirmed the convictions of those who operated the gaming establishment.

Poker was the game involved in *United States* v. *South*, 368 F.2d 252 (5th Cir. 1966), and bingo in *Dillon* v. *United States*, 391 F.2d 433 (10th Cir. 1968). Neither is the kind of game traditionally associated with organized crime.

U.S.C. § 420(a)) in *United States* v. *Local 807*, 315 U.S. 521, 535 (1942). But precedent is of limited value in determining the meaning of another statute, differently phrased, and having its own unique legislative history. Moreover, the Court's efforts in *Local 807* to discern Congress' intent were not notably successful. *See United States* v. *Green*, 350 U.S. 415, 419 (1956).

Appellants' second argument against coverage is that section 1952 applies only to gambling which is illegal under state (or federal) law; and that California Penal Code section 332 does not make it illegal to play gin rummy for money, but only makes it illegal to commit fraud while playing gin rummy for money.[9]

Again, the statutory language does not support appellants' argument. Section 952 speaks not of illegal gambling, but of a more inclusive category: "gambling . . . offenses."[10]

Although Congress did not record the reason for this choice of language, it seems apparent. It is not illegal *per se* to engage in any of the four fields of activity listed in section 1952 under the laws either of the United States or of all fifty states. The statutory approach in these areas has often been regulatory rather than flatly prohibitory—particular conduct is forbidden, or conduct in particular circumstances or

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[9] California Penal Code section 330 prohibits the playing for money of certain listed card games, "or any banking or percentage game played with cards, dice, or any device." Gin rummy is not among the games listed, and does not fall within the quoted description.

[10] In *Turf Center, Inc.* v. *United States*, 325 F.2d 793, 795 (9th Cir. 1963), we held that "offenses" applies to "gambling" as well as to the other three types of conduct specified in section 1952.

That "gambling . . . offenses" is a broader term than "gambling," *see United States* v. *Bergland*, 318 F.2d 159, 161 (7th Cir. 1963).

by particular persons.[11] If section 1952 applied only when all business activity was absolutely prohibited in the particular field, the reach of the section would be materially diminished without apparent reason in terms of the statute's purpose. There is no evidence that Congress intended this result.[12]

Appellants point to the fact that Congress declined to adopt a suggestion that section 1952 be broadened to include interstate travel anl use of interstate facilities in furtherance of criminal fraud.[13] They argue that California Penal Code section 332 simply punishes fraud, and therefore the term "gambling . . . offenses" should not be construed to include violations of section 332.

As originally enacted, the California statute dealt exclusively with cheating while gambling. By a series of amendments its scope was broadened to include fraud in certain other specified contexts.[14] It is not, however, a general fraud statute. It prohibits cheating only in the stipulated contexts, including gambling. It is expressly directed (among other things) at the regulation of gambling conduct. It expressly prohibits (among other things) fraud while gambling. We see no reason for excluding violations of this particular pro-

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[11] No documentation is necessary as to the first three fields of activity. As to the fourth, *see* Nev. Rev. Stats. 201.300-.440, which regulate but do not prohibit prostitution. *Raymond* v. *United States*, 376 F.2d 581 (9th Cir. 1967).

[12] Appellants call attention to occasional references to "illegal gambling" in the legislative proceedings. In context these references do not appear to us to be significant.

[13] Senate Hearings at 113. *See also* 107 Cong. Rec. part 10, p. 13943.

[14] The text of the prior statute is printed as an historical note following Cal. Penal Code § 322 in West's Annotated California Codes.

hibition of section 332 from the category of "gambling . . . offenses."

Appellants call attention to exchanges at committee hearings and in floor debate which indicate that section 1952 is to apply only to illegal business enterprises, and not to illegal conduct incidental to lawful business enterprises.[15] If we

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[15] 107 Cong. Rec. parts 12, 14, pp. 16541-16542, 18815; House Hearings, pp. 335, 336, 339.

The following excerpts from the House Hearings are illustrative:

"[339] Mr. Foley [committee counsel]. At that point, may I interrupt you to clarify this.

"Would you say that as a condition precedent, for any violation of this statute, the individual concerned must be engaged in a business enterprise which is illegal in these four categories that you are talking about?

"Mr. Miller [Assistant Attorney General, Department of Justice]. Absolutely.

"Mr. Foley. In other words, it cannot be a legitimate business with an incidental violation resulting from the interstate travel?

"He must first be engaged in the unlawful activity as a business man?

"Mr. Miller. That is exactly the concept we tried to embody in this bill, Mr. Foley. That is why I go back to the definition of business enterprise, in order to—"

* * *

"[339] Mr. Miller. Mr. Chairman, in order for us to bring any prosecutive action under this statute, the first thing we are going to have to prove is that there was a business that was unlawful under the laws of the State and that business involved the specified violations here."

* * *

"[341] Mr. Miller. . . . [T]his brings up the whole basic concept of this bill, that there is an organized course of conduct within the confines of a State which is unlawful. That is a condition precedent."

* * *

"[341] Mr. Toll. May I follow up the answer, Mr. Miller, that you gave to Mr. Foley and to Congressman Rogers, with an illustration of a fellow that conducts a tavern in Pennsylvania, where the sale of liquor is legal; he goes to New Jersey, buys his liquor by the case, brings it to his tavern in Philadelphia, does not put the stamps on.

understood correctly, the conclusion we are asked to draw is that illegal cheating incidental to lawful gambling is not within section 1952.

Accepting the premise, the conclusion does not follow. This case does not involve cheating incidental to a lawful gambling enterprise. There was no business enterprise involved, lawful or otherwise, absent the cheating. In conception, organization, and execution, appellants' business enterprise was that of cheating at gin rummy for profit; and such a business enterprise was illegal under California Penal Code section 332. There was nothing incidental about the unlawful aspect of appellants' business.

We conclude that appellants' conduct fell within section 1952.

II

Each appellant challenges the sufficiency of the evidence. A few additional background facts are necessary to an understanding of the issues raised.

"That would not be a violation under this law, would it?"

"[342] Mr. Miller. I think there has been a misconception of this statute in this regard. When we defined business enterprise as one involving gambling, liquor violation, and the like, we were thinking of the business itself as being an illegal business. Any business enterprise can have an employee or the president or someone down the line commit some act which is a violation of a statute and therefore, a crime. I mean, he might be rolling dice in the backroom for example, which is a violation of the State law.

"Now, that does not make the business enterprise, itself, an unlawful one. It merely means that one individual has committed a crime, and it has no relation to the business enterprise itself. So I do not foresee that the factual situation you outlined would come within the purview of this bill."

Count 1 of the indictment charged a conspiracy to violate 18 U.S.C. §§ 1952 and 2314; Counts 2 through 12 charged substantive violations of section 1952; Counts 13 through 19 charged substantive violations of section 2314. Counts 20 and 21 were dismissed. Counts 22 through 24 charged violations of 26 U.S.C. § 7206(1). The section 1952 charges required proof that appellants used interstate facilities and traveled in interstate commerce to promote the unlawful gambling enterprise; the section 2314 charges required proof that appellants transported in interstate commerce securities that they knew had been taken by fraud. *See* note 1.

The general theory of the Government's case was as follows: Friedman, the prime mover in the scheme, lived in Las Vegas, Nevada, as did George Seach, who "peeked" the earlier games. Edwin Gebhard, who replaced Seach as "peekman," lived in Miami, Florida. When a rigged game was planned, Friedman telephoned Seach in Las Vegas and asked him to come to Beverly Hills. Seach then traveled to Beverly Hills and "peeked" the game. When Seach went to prison and was no longer available, appellant Jacobs telephoned Gebhard in Miami, and Gebhard traveled to Beverly Hills for the same purpose. Friedman carried checks obtained from victims in payment of losses in the "peeked" games back to Las Vegas and deposited them in his Las Vegas bank account.

Counts 2 through 5 of the section 1952 substantive counts are based on two Friedman-Seach telephone calls and two subsequent Seach trips from Las Vegas to Beverly Hills; Count 6 is based on travel by Friedman and appellant Roselli from Los Angeles to Las Vegas to distribute the pro-

ceeds of a "peeked" game; Counts 7 through 12 are based on three Jacobs-Gebhard telephone calls and three subsequent Gebhard trips between Miami and Beverly Hills. The seven section 2314 counts (Counts 13 through 19) are based on the transportation of eight checks to Las Vegas from Los Angeles County, or, in the process of collection through banking channels[16] from Las Vegas to Los Angeles County, or from Los Angeles County to Chicago via Las Vegas.

With this background we turn to the contentions of each appellant.

Friedman. Friedman restates, in terms of insufficiency of evidence to prove the conspiracy, the argument that the conspiracy did not violate section 1952 because the kind of gambling disclosed by the evidence (gambling at gin rummy) was lawful in California.

He also argues that the proof failed to establish the knowledge required to make out a substantive violation of section 2314—namely, knowledge that the securities transported were obtained by fraud—and hence failed to establish the knowledge required to convict him of conspiracy to violate that section. We agree, of course, that conviction of conspiracy to commit the substantive offense required proof of the knowledge essential to conviction of the substantive offense itself, for "[i]f this minimum intent is not present, no offense is contemplated" by the alleged conspirators. Developments in the Law—Criminal Conspiracy, 72 HARV. L. REV. 920, 939 n. 101 (1959). *See Ingram* v.

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[16] The act of depositing a check drawn on an out of state bank satisfies the requirement that the accused cause the security to be transported in interstate commerce. *Pereira* v. *United States, supra; United States* v. *Sheridan,* 329 U.S. 379, 391 (1946).

United States, 360 U.S. 672, 678 (1959); *United States* v. *Chase*, 372 F.2d 453, 460 (4th Cir. 1967); *Hernandez* v. *United States*, 300 F.2d 114, 120 (1962); *United States* v. *Gardner*, 171 F.2d 753, 754 (7th Cir. 1948). On the other hand, no greater or different intent is required. *See* text at note 17. We therefore consider the question of the sufficiency of the evidence to prove knowledge in our discussion of the evidence supporting the substantive counts.

Friedman challenges the sufficiency of proof of the section 2314 substantive counts. The sentences on these counts were concurrent with those imposed on the section 1952 substantive counts except that a fine in addition to imprisonment was imposed on Counts 13, 15, and 19. We confine our attention to those three counts.

Counts 13 and 15 charged Friedman with transporting specifically described checks in interstate commerce from Los Angeles County to Las Vegas, knowing them to have been taken by fraud. Count 19 charged transportation of a check from Los Angeles County to Chicago via Las Vegas. Friedman argues that the evidence failed to establish that he knew the checks were obtained by fraud or that he transported the checks or caused them to be transported. He concedes that the checks represented winnings from Friars Club card games; his argument is really that the particular checks were not shown to have been taken by fraud because the Government did not demonstrate that they represented winnings from dishonest rather than from one of the concededly many honest games. Similarly, he contends that proof of transportation of the checks is insufficient because, although the checks were deposited in Friedman's Las Vegas account, the Government did not

demonstrate that he or his agent, rather than some other person, brought the checks from Los Angeles County.

Much of Friedman's argument rests upon assumptions as to the standard governing review of the sufficiency of circumstantial evidence that we rejected in *United States* v. *Nelson*, 419 F.2d 1237 (9th Cir. 1969). Our inquiry is simply whether on the evidence the jurors "could reasonably decide that they would not hesitate to act in their own serious affairs upon factual assumptions as probable as the conclusion" that the particular checks were won in "peeked" games and that Frierman transported them or caused them to be transported from Los Angeles County to Las Vegas. *Id.* at 1245.

The evidence that the check involved in Count 13 originated in a "peeked" game was as follows.

As noted earlier, the evidence established a repeated pattern of Friedman's use of interstate telephone facilities to summon Seach, interstate travel by Seach, a "peeked" game, and receipt and distribution of winnings, usually by check. Telephone records showed a long distance call from Friedman in Los Angeles County to Seach in Las Vegas on February 18; money order records established Seach's presence in Los Angeles County on February 21; and Friedman testified that the check involved in Count 13 represented winnings in a game played in Beverly Hills February 20, 1963.

It is possible, on this record, that the February 20 game was honest, as Friedman argues; but the overwhelming probabilities are that it was not. On the evidence the jury could resolve the issue against Friedman "free of 'the kind of doubt that would make a person hesitate to act' in the

more serious and important affairs of his own life." *Nelson, supra* at 1243.

The jury could also have found that Friedman transported the check involved in Count 13 from Los Angeles County to Las Vegas. Friedman admitted that the particular check was given to him in Los Angeles on February 21; records that he introduced showed that he traveled from Los Angeles to Las Vegas on February 22; and bank records and his own testimony established that the check was deposited in his account in Las Vegas on February 25.

The evidence supporting Count 15 is similar in character and at least as strong.

This is not true, however, of the evidence relating to Count 19. The crucial difference is that there was no proof connecting the checks referred to in Count 19 with a particular game. Since many of the games were not "peeked," the jury's determination that these checks were taken by fraud is without evidentiary support. Friedman's conviction on this count will be reversed.

Teitelbaum. Teitelbaum argues that the evidence was insufficient to support his conviction of conspiracy to violate sections 1952 and 2314 because it failed to establish that he agreed to the use of the interstate facilities and to the interstate travel and transportation, which are essential elements of the substantive offenses. We reject the argument on alternate grounds. First, the knowing use of interstate facilities is not an essential element of either the substantive offenses or the conspiracy to commit them; and, second, if it were, the evidence was sufficient to establish that Teitelbaum acted with the requisite knowledge.

The words of sections 1952 and 2314 do not suggest that Congress intended to condition liability upon knowing use

of interstate facilities; their natural import is to the contrary. In both sections the requisite mental state is identified, and in neither does it include knowledge of the interstate element of the offense. *See* note 1; *United States* v. *Bash*, 258 F. Supp. 807, 809-813 (N.D. Ind. 1966), *aff'd sub nom. United States* v. *Miller*, 379 F.2d 483 (7th Cir. 1967). *Compare* 18 U.S.C. §§ 1084, 1958, 2421.

We have found nothing in the legislative history that indicates a purpose to limit sections 1952 and 2314 to violators who specifically intend to utilize interstate facilities. It is quite clear that the enacting section 1952 Congress was not concerned with regulating interstate travel or the use of interstate facilities, but rather with directly suppressing unlawful local activities from which organized crime drew its sustenance. Similarly, section 2314 is aimed at the evils of theft, fraud, and counterfeiting and not at the regulation of interstate transportation. Suppression of movement of the fruits of theft and fraud is only the means to the end of suppressing theft and fraud themselves. The sole reason for conditioning the statutes' prohibitions upon use of interstate commerce is to provide a constitutional basis for the exercise of federal power.

As the Second Circuit recently pointed out in discussing the same issue in connection with 18 U.S.C. § 1343, the purpose of statutes of this kind argues against a construction making a specific "anti-federal" intent an element of the offense:

> "The statute does not condition guilt upon knowledge that interstate communication is used. The use of interstate communication is logically no part of the crime itself. It is included in the statute merely as a ground for federal jurisdiction. The essence of the crime is the fraudulent scheme itself. Nothing is

> added to the guilt of the violator of the statute by reason of his having used an interstate telephone to further his scheme. There is consequently no reason at all why guilt under the statute should hinge upon knowledge that interstate communication is used. If the wire employed is an interstate wire the requirements for federal jurisdiction are satisfied. It is wholly irrelevant to any purpose of the statute that the perpetrator of the fraud knows about the use of interstate communication." *United States* v. *Blassingame,* F.2d (2d Cir. June 1, 1970).[17]

Accordingly, knowing interstate travel or knowing use of an interstate facility is not an essential element of a violation of section 1952; *See United States v. Miller supra,* 379 F.2d at 487; *cf. Spinelli* v. *United States,* 382 F.2d 871, 893 (8th Cir. 1967), *rev'd on other grounds,* 393 U.S. 410 (1969); *United States v. Chase,* 372 F.2d 453, 460 (4th Cir.

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[17] Similarly in construing 18 U.S.C. § 641 as not requiring proof that the stolen property belonged to the United States, Judge Hufstedler said in *United States* v. *Howey,* F.2d (9th Cir. June 5, 1970):

> "The reason for including the requirement that the property, in fact, belongs to the Government was to state the foundation for federal jurisdiction. A defendant's knowledge of the jurisdictional fact is irrelevant, as we have held in many cases interpreting analogous statutory provisions. (E.g., *United States* v. *Kartman* (9th Cir. 1969) 417 F.2d 893; *McEwen* v. *United States* (9th Cir. 1968) 390 F.2d 47. *See also United States* v. *Bolin* (9th Cir. 1970) 423 F.2d 834.)

See also Baker v. *United States,* F.2d (9th Cir. July 17, 1970).

Illustrative cases interpreting analogous statutes as not requiring knowledge of the federal jurisdictional fact are collected in Judge Carter's opinion in *United States* v. *Bolin,* 423 F.2d 834, 836-837 (9th Cir. 1970).

1967), and knowing interstate transportation is not an essential element of a violation of section 2314, *see United States* v. *Kierschke*, 315 F.2d 315, 318 (6th Cir. 1963); *cf. Hulsey* v. *United States*, 369 F.2d 284, 287 (8th Cir. 1966); *Pritchard* v. *United States*, 386 F.2d 760, 764 (8th Cir. 1967).

There is therefore no rational basis for holding that such knowledge is an essential element of a conspiracy to commit the offenses created by the substantive sections. The essence of the offense under the general conspiracy statute, 18 U.S.C. § 371, is an agreement by two or more persons to commit the substantive crime. In virtually all cases the meeting of minds is established simply by inference from a concert of action that produces the forbidden result. There is no apparent reason for requiring not only proof of concert of action that includes all elements of the substantive offense, but also proof of knowledge of the jurisdictional element that is not required for conviction of the substantive offense. Such knowledge is as irrelevant to the purposes of the general conspiracy statute[18] as it is to the purposes of the substantive statutes. *See* Developments in

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[18] The reasons for condemning conspiracies were stated in *United States* v. *Rabinowich*, 238 U.S. 78, 88 (1915):

> "For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its disovery, and adding to the importance of punishing it when discovered."

These evils of conspiracy are present whether or not the conspirators are aware of the jurisdictional aspects of their crime.

the Law—Criminal Conspiracy, 72 HARV. L. REV. 920, 938-939 (1959).[19]

Teitelbaum's argument is that conspiracy to commit a federal substantive offense necessarily includes an agreement upon all elements of that offense. We think it sufficient that the agreement contemplates the commission of a crime and that the crime contemplated is in fact and law a federal offense.

It is an element of the offenses created by the first paragraph of section 2314 that the value of the stolen securities exceeds $5,000. It would not be a defense to a charge of the substantive offense that the accused *thought* the securities worth only $2,000, if in fact their value exceeded the statutory minimum.[20] Can it be that a lack of knowledge of this jurisdictional element would nonetheless afford a defense to a charge of conspiracy to violate section 2314?

It may be argued that because a conspiracy to commit a substantive offense may exist without actual commission of the substantive offense, conspiracies to commit state crimes might be charged under the federal conspiracy laws if there were no need to prove agreement about the aspects of the crime that confer federal jurisdiction. The simple answer is that absent the presence of the jurisdictional element, no

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[19] Several opinions have assumed the need for such proof, but apparently without consideration of the problem. *See, e.g., Pereira* v. *United States,* 347 U.S. 1, 12-13 (1954) (conspiracy to violate §2314); *United States* v. *Edwards,* 366 F.2d 853, 869 (2d Cir. 1966) (same); *United States* v. *Fellabaum,* 408 F.2d 220, 223-224 (7th Cir. 1969) (conspiracy to violate §1952); *United States* v. *Barnes,* 383 F.2d 287 (6th Cir. 1967) (same).

[20] The value of property taken by fraud is determined by the market value at the time and place of taking, *Cave* v. *United States,* 390 F.2d 58, 67 (8th Cir. 1968).

charge can be made. The point is not that the jurisdictional element need not exist, but merely that there need be no proof that the defendants were aware of its existence.

In the second place, as we have said, Teitelbaum's conviction of conspiracy was proper even if knowledge of the interstate aspects of the illegal scheme is an essential element of the offense.

In *Twitchell* v. *United States*, 313 F.2d 425 (9th Cir. 1963), we construed the Mann Act, 18 U.S.C. §§ 2421-2422, as requiring knowledge of the illegal transportation of females in interstate commerce for immoral purposes.[21] We held,

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[21] Our construction of the Mann Act in *Twitchell* is not inconsistent with the interpretation we have given to sections 1951 and 2813.

The words of the Mann Act ("Whoever *knowingly* transports in interstate or foreign commerce," etc.) strongly suggest that knowledge of the interstate transportation is an element of the offense.

Moreover, the Act's legislative history establishes that Congress's purpose was not to control local immorality but rather to deny the use of interstate facilities to a traffic viewed as evil.

Opposition to the bill that became the Mann Act was based largely on the thesis that, although cast in the form of a regulation of interstate commerce, the statute was in reality an attempt to regulate prostitution and other immoral practices exclusively within the states' police power. *See, for example,* H. R. Rep. No. 47, 61st Cong., 2d Sess., Part 2, Views of the Minority, particularly page 1, and discussion at 45 Cong. Record 809-811, 1030-1035. Proponents of the bill repeatedly assured Congress that the statute's intent was to deal solely with the evil of transportation of women and girls in interstate and foreign commerce for immoral purposes. Thus, the Report of the House Committee on Interstate and Foreign Commerce denies any purpose to interfere with state control of local immorality, insists repeatedly that the evil at which the statute is directed is the movement of women and girls in commerce—the importation of women and girls and their transportation from one state to another—and points out that the Act's prohibitions "have been so drawn that they are limited to cases in which there is an act of transportation in interstate commerce of women for purposes of prostitution." H. R. Rep.

however, that possession of the requisite knowledge by one charged with conspiracy to violate the Act could be established by circumstantial proof that he agreed to a scheme "in which it was known that the likelihood of illegal interstate transportation was great." (429)

At Teitelbaum's request, the jury was instructed in accordance with the *Twitchell* formulation,[22] in a manner that completely satisfied his definition of the elements of the present offenses; and we are satisfied that the evidence was sufficient to justify the jury's conclusion that the proof of his guilt met the *Twitchell* standard.

No. 47, 61st Cong., 2d Sess., pp. 1, 2, 3, 4, 5, 9, 10, 11. Identical statements appear in the Senate Report. S. Rep. No. 886, 61st Cong., 2d Sess., pp. 7, 8, 9, 10, 11. Although the bill was not debated in the Senate, the same theme ran through the debate in the House, the bill's proponents repeatedly asserting that the statute's prohibitions were aimed solely at the transportation of persons in commerce. *See particularly* the discussion of Congressmen Russell, Peters, and Sanders, who carried the burden of the legal argument for the proponents, at 45 Cong. Record 814-821, 1035-1040.

[22] The full formulation in *Twitchell* is as follows:

> "We think that, in a case of this kind, the evidence must show in relation to Twitchell that either:
>
> "1. he *directly* agreed to the illegal interstate transportation, or *directly* agreed to a scheme which could not be consummated without illegal interstate transportation, or *directly* agreed to a scheme in which it was known that the likelihood of illegal interstate transportation was *great* (it being understood that such agreement need not be overt, and may be inferred from circumstantial evidence; and that directness refers not to face-to-face dealings, but to the extent of his knowledge of the purpose and scope of the conspiracy); or
>
> "2. he evidenced his indirect agreement by substantial participation in the scheme *with actual knowledge* of the proposed, or completed, illegal interstate transportation." 313 F.2d at 429.

There was direct testimony by Seach that Teitelbaum joined the conspiracy in September 1962, and participated actively in it until at least April 1963. He set up at least one rigged game, played in such games, received signals from the hidden "peekman," and shared in the spoils. As we have noted, the evidence also established, as an integral part of the scheme, a pattern of interstate phone calls, interstate travel, and interstate transportation.[23] The jury was entirely warranted in concluding, as we do, that it is inconceivable that one so intimately connected with the conspiracy over so long a period could have been unaware of these interstate activities. *See Pereira* v. *United States*, 347 U.S. 1, 12-13 (1954); *United States* v. *Corallo*, 413 F.2d 1306, 1326-1327 (2d Cir. 1969); *Grimes* v. *United States*, 379 F.2d 791, 795-796 (5th Cir. 1967); *Nassif* v. *United States*, 370 F.2d 147, 152-153 (8th Cir. 1966).

Teitelbaum also challenges the sufficiency of the evidence to sustain his conviction on the various counts charging substantive violations of sections 1952 and 2314. The jury was instructed, in accordance with the holding in *Pinkerton* v. *United States*, 328 U.S. 640, 647 (1946), that each defendant could be found guilty of the substantive offenses with which he was charged if the evidence established that he had joined the conspiracy and that the substantive offenses were com-

[23] Teitelbaum points out that Seach had taken an apartment in Beverly Hills by the time Teitelbaum joined the conspiracy. The evidence showed, however, that while Seach spent the week days in his apartment behind the Friars Club during the period of heaviest play, he returned to Nevada for the weekends; when play slackened, Seach remained in Las Vegas, returning to Los Angeles County only when called by Friedman or Mathes to "peek" a game. Also, Friedman made frequent trips between Nevada and California during this period.

mitted in furtherance of it.[24] Teitelbaum does not argue that the evidence was insufficient to establish the conspiracy or his participation in it, nor does he argue that the substantive offenses were not committed pursuant to that conspiracy. Nonetheless, he advances two reasons why his convictions under the substantive counts should not be affirmed on the *Pinkerton* theory.

First, he contends, and urged the trial court to instruct the jury, that he could be convicted under Counts 2 through 12 on the *Pinkerton* theory only if the jury found that he had "actual personal knowledge" of the particular interstate telephone call and of the particular interstate travel alleged in a specific count. He asserts that evidence of such knowledge was lacking. But *Pinkerton* rests upon the general principle of conspiracy law that each conspirator is responsible for the acts of the others pursuant to and in furtherance of the conspiracy (328 U.S. at 646-647), and it is well settled that "he is liable for the acts of his co-con-

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[24] The instruction read:

"With respect to all of the substantive offenses charged in Counts Two through Nineteen of the indictment, if you are satisfied from the evidence beyond a reasonable doubt that at the time these substantive offenses were committed, if they were committed, the defendants named in each of the substantive counts were members of an unlawful conspiracy, as I have heretofore defined unlawful conspiracy to you, then you may find the defendants guilty on all of the substantive counts, provided the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy, which you have found from the evidence existed."

Of course, *Pinkerton* applies only when the intent required for conviction of the conspiracy encompasses the intent required for conviction of the substantive offenses (*Hernandez* v. *United States*, 300 F.2d 114, 121, n. 17 (9th Cir. 1962)); and, as we have seen, this condition is satisfied in the present case.

spirators though he was not aware of the performance of those acts, nor even of the existence of the actors." *Hernandez* v. *United States, supra,* 300 F.2d at 122.[25]

Teitelbaum's second argument arises because Counts 2 through 12 of the indictment alleged that he aided and abetted the commission of the offenses charged; yet the trial court instructed the jury that as to all but one of these counts, Teitelbaum could not be convicted as an aider and abettor, but could only be convicted under the *Pinkerton* theory because there was no evidence that he was personally aware of the interstate telephone calls and interstate trips specified in these counts. Teitelbaum contends that because the indictment alleged that he aided and abetted the commission of the substantive offenses, the court's instruction that he could be convicted of the substantive offenses under the *Pinkerton* theory "broadened" the indictment and denied him his Fifth Amendment right to be held to answer only "on a presentment or indictment of a Grand Jury." A conspirator, however, may be convicted on the *Pinkerton* theory without a specific allegation that a co-conspirator

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[25] The only support for Teitelbaum's contention is found in dictum in *United States* v. *Barrow,* 229 F.Supp. 722, 733-734 (E.D. Pa. 1964), *rev'd in part on other grounds,* 363 F.2d 62 (3d Cir. 1966). The *Barrow* court did not consider the rationale upon which we rest our contrary conclusion.

The ruling in *Barrow* related to another problem, whether the jury should be instructed that a conspirator may not be convicted of a substantive offense committed by a co-conspirator if commission of the offense "could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Pinkerton,* 328 U.S. at 648. While this additional language may be added to the instruction if requested, it does not appear in the instruction approved in *Pinkerton,* see 328 U.S. at 645, n. 6, and its omission is not reversible error. *United States* v. *Edwards,* 366 F.2d 853, 869 (2d Cir. 1966).

committed the offense in furtherance of the conspiracy.[26]

Hence, the only possible basis for objection by Teitelbaum is that the wording of the indictment somehow misled him to his prejudice. He appears to complain because the allegation that he aided and abetted the commission of the offenses caused him to come forward with a defense, and a successful one, specifically directed to that theory of liability, but since he would have been exposed to liability on this theory in any event, the particularization did him no harm.[27] He does not suggest, even now, that he failed to present any evidence or argument that he might have presented had the indictment omitted the specific charge of aiding and abetting, or had it spelled out the *Pinkerton* theory of liability. It was clear from the face of the indictment that the conspiracy charge and the substantive charges were based on a single course of conduct by the alleged conspirators, including Teitelbaum. Since he was charged as a conspirator, he was on notice that he must defend against that charge, and he did so, vigorously. Since he was charged as an aider and abettor, he was on notice to establish, if he could, any possible legal or factual defense to the substan-

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[26] No such allegation is mentioned in Pinkerton or in any of the decisions following it. Of course, the jury must be instructed on the Pinkerton theory of liability if a conviction is to be sustained on that theory. *Nye & Nissen* v. *United States*, 336 U.S. 613, 618 (1949); *Thomas* v. *United States*, 398 F.2d 531, 541 (5th Cir. 1967).

[27] An accused charged with an offense may be convicted on evidence showing that he aided and abetted another in the commission of that offense, even though the indictment does not allege this theory of liability; hence the language of the indictment charging him with aiding and abetting was simply surplusage. *E.g.*, *United States* v. *Lester*, 363 F.2d 68, 72 (6th Cir. 1966); *Lambert* v. *United States*, 226 F.2d 602 (5th Cir. 1955).

tive offenses. The remaining element of *Pinkerton* liability —that the substantive offenses, if committed, were acts in furtherance of the conspiracy—was not subject to argument in the context of this case.

Roselli. Roselli's principal contention is that statements by Friedman that implicated Roselli should have been excluded as hearsay because there was insufficient evidence independent of the statements to support the trial judge's required preliminary finding that Roselli was engaged in a joint undertaking with the declarants. *Glasser* v. *United States,* 315 U.S. 60, 74 (1942); *Carbo* v. *United States,* 314 F.2d 718, 735-738 (9th Cir. 1963).

We disagree.

Roselli was identified as being present at a number of rigged games, although not as a player.

The proceeds of one "peeked" game included three checks totaling $31,500 given to Teitelbaum by one of the victims. At Teitelbaum's request, the victim subsequently replaced one of the checks with a new one for $10,000 made out to "J. Martinez," a fictitious name. Friedman ultimately gave this same check to his secretary in Las Vegas and instructed her to collect it and give the proceeds to Roselli. She delivered to Roselli an envelope containing $10,000 in cash. He gave her a $100 gratuity in return. Friedman denied that this represented Roselli's share of the proceeds of the rigged game and testified that Roselli was merely acting as a messenger to pay a debt Friedman owed to a third party. The trial court, however, was not required to believe this improbable explanation.

Seach testified that about this time Roselli was present at a meeting between Seach and Friedman. When Seach de-

scribed a new peeking device he had developed, Friedman suggested that Seach "leave it with us, and we'll put a share of the profits away for you." Seach refused, remarking, "It's hard enough to get your money when you're there, John, isn't it?" Roselli replied, "That's right"; and continued, "From now on I'm going to be there."

This evidence was sufficient to support the trial court's conclusion that a prima facie case involving Roselli in the joint enterprise had been made out. Friedman's statements in furtherance of the common enterprise were therefore admissible against Roselli, and this additional evidence furnished adequate support for the jury's verdict against him under Count 1.[28]

Roselli was also convicted of substantive violations stemming from transportation of the "J. Martinez" check to Las Vegas from Los Angeles.[29] There was ample proof, if believed, to convince the jury that Friedman was responsible for transporting the check to Las Vegas in furtherance of the conspiracy, and thus to justify Roselli's conviction of the substantive counts as Friedman's coconspirator.

Finally, Roselli was convicted under Count 22 of willfully filing a false income tax return. The jury, as well as the judge, could have rejected Friedman's testimony and concluded that the $10,000 Roselli received in Las Vegas was not Friedman's money but Roselli's, and it is undisputed that Roselli failed to declare it as income.

Jacobs. Appellant Jacobs became involved about the time Mathes and Seach, the two Government witnesses who par-

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[28] Both Mathes and Seach testified that Friedman had told them that Roselli knew about the "peek" and had been cut in as a partner.

[29] Counts 6, 16, 17, and 18 were all based upon the interstate transportation of the "Martinez" check.

ticipated in the scheme, were leaving. Most of the evidence relating to Jacobs' participation is therefore circumstantial and considerably less detailed than that relating to the other appellants, but we are entirely satisfied that it was sufficient to support the verdict.

Two problems merit discussion.

The Government introduced telephone records reflecting calls on particular dates between phones in Jacobs' residence in Los Angeles, California, and Gebhard's residence in Miami, Florida, to prove the three Jacobs-Gebhard telephone calls underlying Counts 7, 9, and 11.[30] The Government concedes that there is no direct proof identifying the caller, the recipient, or what was said. Jacobs argues that for this reason the evidence was insufficient, citing *Osborne* v. *United States*, 371 F.2d 913 (9th Cir. 1967).[31]

Osborne does not hold that the parties and subject matter must be established by direct evidence, but only that the proof of those facts, direct or circumstantial, must be sufficient. To avoid repetition, we defer summarizing the relevant circumstantial evidence in this case to our later discussion of the problem of variance. That evidence was sufficient, in our opinion, to permit the jury to conclude that the calls were made by Jacobs and received by Gebhard, that their substance was a summons to Gebhard to "peek"

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[30] Gebhard's subsequent trips to Los Angeles formed the basis of Counts 8, 10, and 12.

[31] Friedman's related argument that the telephone records were not admissible as evidence of conspiracy without foundation proof identifying the parties and subject matter is without merit. *United States* v. *Novick*, 124 F.2d 107, 110 (2d Cir. 1941); *United States* v. *Gallo*, 123 F.2d 229, 231 (2d Cir. 1941).

games at the Friars Club, and that Gebhard then came to Los Angeles for this purpose.

The second problem relates to the charge in Count 24 that Jacobs willfully filed a false income tax return that did not report income "in excess of $20,000" won from card-playing activities at the Friars Club. The Government's evidence showed payments of $24,750 to Jacobs by a single loser in the year in question. Jacobs did declare $17,000 in income from "sporting enterprises," and the jury was instructed that "sporting enterprises" was an acceptable term for gambling income. Hence, the undisclosed balance established by the evidence was $7,750 rather than "in excess of $20,000" as alleged. Jacobs argues that the Government was bound by its allegation. It is enough that the Government establishes that substantial income went unreported. *United States* v. *Johnson*, 319 U.S. 503, 517-518 (1943).

III

Appellants Roselli and Jacobs argue that the Government alleged one conspiracy but proved at least two and that this variance requires reversal under *Kotteakos* v. *United States*, 328 U.S. 750 (1946).

Roselli rests his argument upon the assertion that the Government's evidence connected him with only one of the many rigged games. His evaluation of the record is not accurate, but even if it were, that he participated in only one of the series of rigged games would not establish that the particular game reflected a separate conspiracy rather than one incident in a continuing conspiracy encompassing the series of games. The only difference between the game

to which Roselli refers and the games preceding and following it is that this game marked the point at which Roselli began to share in the proceeds. The same conspirators cheated in the same way before that game and after. In *Kotteakos,* there were in fact separate conspiracies operating independently of each other, though involving a common person.

Jacobs' contention is somewhat different. He argues that the Government's proof showed at least two conspiracies separated in time. He asserts that there was no evidence that the rigged games continued between July of 1963 when Seach was imprisoned and January of 1965 when Gebhard was observed sawing a hole in the roof of the Friars Club, and that the only early conspirator who was connected with the post-1965 period was Friedman.

We believe the evidence was sufficient to permit the jury to conclude that the conspiracy continued after Seach's last game.

Shortly after Seach "peeked" his last game Jacobs wired funds to Gebhard in Miami. Although Seach was gone, the games went on, and the two main victims, Briskin and Karl continued to lose about eighty percent of the time, the same rate of loss they had experienced while Seach was "peeking" the games. In September of 1963 a new card room was opened on the third floor of the Friars Club. New "peekholes" were installed; Briskin and Karl continued to lose. Two hatches on the roof of the Friars Club provided access to the "peekholes." The first was observed in August of 1964. Gebhard was seen sawing a hole for the second in July of 1965. Physical evidence established that sometime after May of 1965 Gebhard was in the airspace between the

roof and the third floor ceiling where the "peekholes" were cut. The pattern of telephone calls, travel, gambling beneath the "peekholes," and distribution of proceeds, which characterized the Seach period, continued after Seach's departure. There was proof of telephone calls from Jacobs' residence in Los Angeles to Gebhard's residence in Miami, followed by trips by Gebhard to Los Angeles, and by the presence of Friedman, Jacobs, and Gebhard in Los Angeles in October and November, 1964, December, 1964 and January, 1965, March and April, 1965, and October and November, 1965. Games were played under the "peekholes" during these periods, and transfers of funds occurred between Jacobs and Friedman (February 1965), Friedman, Jacobs, and Rosselli (April 1965), and Friedman and Jacobs (June 1966). Seach testified to admissions by Jacobs and Friedman in July 1966 that indicated that sometime earlier, after Seach's imprisonment, Gebhard had "pooled" games in which Jacobs and Friedman participated.

Whether there was one conspiracy or two was a question of fact for the jury. *United States* v. *Crosby*, 294 F.2d 928, 945 (2d Cir. 1961). Giving permissible weight to the presumption of continuity of a once-established conspiracy,[22] the jury could conclude that but a single overall scheme was involved, having unity of purpose and means and a continuity of membership (though the individual participants varied and the periods of their activity overlapped), and that this continuing concert of action, though occasionally quiescent, was never wholly abandoned. There was a marked

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[22] *United States* v. *Perlstein*, 126 F.2d 789, 798 (3d Cir. 1942); *United States* v. *Marino*, 91 F.2d 691, 695 (9th Cir. 1937); *Costa V. United States*, 59 F.2d 173, 174 (9th Cir. 1932).

difference in the detail and directness of the proof relating to the early and later periods, but, as we have noted, this is attributable not to a change in the scheme but to the fact that participants testified as to the early activity in detail, while the evidence relating to later activity was largely circumstantial.

Since the evidence established a single conspiracy it is immaterial, if true, that Jacobs participated only in its later stages.

IV

Appellants Rosselli, Teitelbaum, and Jacobs were separately charged, in Counts 22, 23, and 24, with failing to report income received from card-playing activities at the Friars Club. Teitelbaum and Rosselli argue that, under Federal Rule of Criminal Procedure 8, the tax counts were improperly joined (1) with each other, and (2) with the other counts of the indictment, and should have been severed. In addition, all three assert error in the denial of their motions under Federal Rule of Criminal Procedure 14 for separate trial on all counts on the ground that a joint trial was prejudicial.

We consider first whether joinder was permissible under Rule 8.

We set aside appellants' argument that joinder was improper because the tax charges were not similar in character to the charges under sections 1952 and 2314. Joinder of charges against multiple defendants is controlled by Rule 8 (b), not by Rule 8(a). *Cupo* v. *United States*, 359 F.2d 930, 932 (D.C. Cir. 1966); *King* v. *United States*, 355 F.2d 700, 704 (1st Cir. 1966); *see Williamson* v. *United States*, 310

F.2d 192, 197 (9th Cir. 1962); Wright, Federal Practice and Procedure, Vol. 1, § 144. Under Rule 8(b), the sole basis for joinder of charges against multiple defendants is that the defendants "are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." It is irrelevant that Rule 8(a) permits charges "of the same or similar character" to be joined against a single defendant, even though they do not arise out of the same or connected transactions. Charges against multiple defendants may not be joined merely because they are similar in character. *Cupo*, *supra*, at 933; *King*, *supra* at 703; *Williamson*, *supra*; *Wright*, *supra* at 325), and even dissimilar charges may be joined against multiple defendants if they arise out of the same series of transactions constituting an offense or offenses. *See, e.g., Scheve v. United States*, 184 F.2d 635 (D.C. Cir. 1950) (keeping a gaming table and aggravated assault). Except for this difference, the test for joinder under the two provisions is the same. 8 Moore's Federal Practice 8-23, 8-24.

Appellants concede that, on the Government's theory of the evidence, both the conspiracy count and the substantive counts under sections 1952 and 2314 grew out of a series of transactions relating to the "pooled" games at the Friars Club that were participated in by all defendants and therefore that these counts were properly joined, subject to defendants' right to relief under Rule 14 on a showing of undue prejudice. They contend, however, that the alleged failure of each of them to report his winnings from the ille-

gal enterprise [33] was an individual act and not part of the series of acts in which all defendants participated.

It is implicit in the language of Rule 8(b) that so long as all defendants participate in a series of acts constituting an offense or offenses, the offenses and defendants may be joined even though not all defendants participated in every act constituting each joined offense.[34] Rule 8(b)'s "goal of maximum trial convenience consistent with minimum prejudice"[35] is best served by permitting initial joinder of

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[33] The indictment alleged that the unreported income came "from card playing activities at the Friars' Club." However, the evidence relied upon by the Government at trial related to unreported income of Tenenbaum and Roselli from "pooled" games. Although Rule 8(b) standards are stated in terms of required allegations, a conviction will not be reversed on appeal if the evidence at trial establishes that joinder was proper; for even if the rule is read literally to require that the basis for joinder appear on the face of the pleading, the error would then be harmless. *Griffin* v. *United States*, 272 F.2d 801, 802-803 (5th Cir. 1959).

[34] The closing sentence of Rule 8(b) reads:

> "Such defendants may be charged in one or more counts together or separately *and all of the defendants need not be charged in each count.*" (Emphasis added.)

See Wright, Federal Practice and Procedure, Vol. 1, at 324; *Williamson* v. *United States*, 310 F.2d 192, 197 n. 16 (9th Cir. 1962); *Kinnette* v. *United States*, 230 F.2d 749, 753 (5th Cir. 1956); *Schaaf* v. *United States*, 184 F.2d 695, 696 (D.C. Cir. 1950).

[35] 8 Moore's Federal Practice at 8-36. In *Bruton* v. *United States*, 391 U.S. 123, 131 n. 6 (1968), the Court quoted with approval the following language from *Daley* v. *United States*, 231 F.2d 123, 125 (1st Cir. 1956):

> "The rules are designed to promote economy and efficiency and to avoid a multiplicity of trials, where these objectives can be achieved without substantial prejudice to the right of defendants to a fair trial."

See also, *King* v. *United States*, 355 F.2d 700, 703 (1st Cir. 1966); *Catanese* v. *United States*, 167 F.2d 820, 823 (4th Cir. 1948); 8 Moore's Federal Practice 8-3, 8-36; ABA Minimum Standards for Criminal Justice, Joinder and Severance, 15-16 (Approved Draft 1968). *Cf. Baker* v. *United States*, 401 F.2d 958, 971 (D.C. Cir. 1968) (Rule 8(a)).

charges against multiple defendants whenever the common activity constitutes a substantial portion of the proof of the joined charges.

Under this standard, joinder was permissible here. Proof of the cheating at the Friars Club and the distribution of the proceeds was a substantial part of the proof of both the conspiracy charge and the substantive charges under sections 1952 and 2314. It was also a substantial part of the evidence supporting the tax charges, which required proof of the receipt of income as well as proof that such income was not reported. Indeed, the only Government evidence applicable solely to the tax counts was the tax return of each appellant for the year in question. Because of this large area of overlapping proof, trial economy and convenience were served by joinder, and because the area of proof that would be inadmissible at separate trials was relatively small, any additional prejudice to the defendants from the joinder was slight.

In *United States* v. *Granello*, 365 F.2d 990 (2d Cir. 1966), it was held impermissible to join charges against two defendants for failing to report income simply because they had earned the unreported income in joint business activity. The court based its conclusion on the language of Rule 8(b), which permits joinder only if defendants participated in the same acts or series of acts "constituting an offense or offenses." In *Granello*, the joint business activity was not in itself illegal. In the present case, however, the joint activity

from which the unreported income was received constituted an offense or offenses in itself.[36]

Granello does not hold that the joined offenses, or any of them, must be based entirely upon the acts or series of acts in which all defendants participated, and it is clear that they need not. For example, in *Turner* v. *United States*, 222 F.2d 926 (4th Cir. 1955), joinder of separate charges of failing to report income against two individuals was permitted where the defendants earned the unreported income in a partnership business.[37] In *Daley* v. *United States*, 231 F.2d 123 (1st Cir. 1956), the court upheld joint trial of defendants individually charged with failure to register, and with failure to pay an occupational tax, before engaging in a gambling business, as required by 26 U.S.C. (I.R.C. 1939), §§ 3285, 3291. Each individual was required to register and to pay the occupational tax separately. Joinder was permitted because all of the defendants participated in the same gambling business that "constituted the concluding element of the two offenses" (126).[38] *Evans* v. *United*

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[36] Hence, it is not necessary to decide whether we agree with *Granello*. On the one hand, the goal of trial economy is served by joinder whenever the overlapping evidence arising out of joint activity is great, whether or not that joint activity is in and of itself illegal. On the other hand, confining joinder of defendants to cases in which the series of acts or transactions in which all participate is itself illegal limits the individual's exposure to joint trial to situations that he is more clearly on notice to avoid.

[37] *Granello* distinguishes *Turner* on the ground that in *Turner* the defendants had jointly falsified the partnership records and filed false partnership returns that were the basis of the individual returns.

[38] The court rested its decision upon considerations of trial economy:

> "Considering the participation by the defendants in the same gambling business as 'the same act or transaction,' is it the

States, 349 F.2d 653 (9th Cir. 1965), is to the same effect. In *Scherr* v. *United States*, *supra*, 184 F.2d 695, all jointly tried defendants were charged with keeping a gaming table, and one defendant was charged with assaulting a disgruntled customer.

Baker v. *United States*, *supra*, 401 F.2d 958, is also relevant here, although it involved joinder of charges against a single defendant.[39] The court held that charges of larceny and interstate transportation of fraudulently obtained funds were properly joined with a charge of evading income tax for the year of the theft, because

> "In determining whether offenses are based on 'acts or transactions connected together,' the predominant consideration is whether joinder would serve the

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same act or transaction 'constituting an offense or offenses,' within the meaning of Rule 8(b)? In a hypercritical reading of the rule, it may be suggested that proof of a particular defendant's participation in such act or transaction does not of itself establish the offense charged, for this particular defendant might or might not, have paid the occupational tax, or complied with the registration requirements. But Rules 13 and 8(b) are not to be read so narrowly. See *Catanzo* v. *United States*, 4 Cir. 1948, 167 F.2d 820, *Jordan* v. *United States*, 5 Cir. 1941, 120 F.2d 65. The rules are designed to promote economy and efficiency and to avoid a multiplicity of trials, where these objectives can be achieved without substantial prejudice to the right of the defendants to a fair trial. Rule 8(b) on its face contemplates the situation where some of the evidence might be admissible against one defendant and not against a codefendant at a single trial, for in its concluding clause the rule provides that 'all of the defendants need not be charged in each count.'" (231 F.2d at 125).

[39] As noted earlier in the text, although Rule 8(a) allows joinder of offenses solely on the ground that they are of "same or similar character," while Rule 8(b) does not, the tests under the two are otherwise indistinguishable. 8 Moore, *supra*, 8-23 - 8-24. The "same or similar character" basis for joinder was not involved in *Baker*.

goals of trial economy and convenience; the primary purpose of this kind of joinder is to insure that a given transaction need only be proved once. In view of this rationale and the fact that the tax evasion charge could not be proved without establishing the theft as well, the district court's conclusion that the offenses were 'connected together' was fully warranted." (401 F.2d at 971-972).

If we are wrong in our interpretation of Rule 8(b), and joinder of the tax counts with the others was improper under the rule, we would hold the error harmless. Although it is frequently said that a joinder not authorized by Rule 8 is prejudicial per se,[40] an examination of the cases indicates that prejudice is assumed without further inquiry only where two or more defendants have been tried jointly on wholly unrelated charges. *Baker* v. *United States*, *supra*, 401 F.2d at 974.[41] We agree with the reasoning that led the Courts of Appeals for the District of Columbia and Second Circuits to conclude that Rule 52 is applicable to misjoinder. *Baker* v. *United States*, *supra* at 973; *United States* v. *Gramello*, *supra*, 365 F.2d at 385. *See also Scherer* v. *United States*, *supra*, 184 F.2d 695, 696.

As noted earlier, with the sole exception of the tax returns, all evidence admitted at the joint trial in this case would have been admissible at a separate trial of the con-

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[40] Wright, *supra*, 325; Moore, *supra*, 8-4, 8-14, and cases cited note 41.

[41] *See, e.g., Metheany* v. *United States*, 365 F.2d 90, 94 (9th Cir. 1966); *United States* v. *Gramello*, *supra*; *Cupo* v. *United States*, *supra*; *King* v. *United States*, *supra*; *Ward* v. *United States*, 289 F.2d 677, 678 (D.C. Cir. 1961); *Ingram* v. *United States*, 272 F.2d 567, 569, 570 (4th Cir. 1959); *see McElroy* v. *United States*, 164 U.S. 76, 80-81 (1896).

spiracy and substantive charges under sections 2314 and 1952. In this context, the additional disclosure that some of the participants had failed to include a small part of the profits from the illicit scheme in their income tax returns would hardly seem calculated appreciably to prejudice the defendants. And, since the greater part of the proof relating to the rigged games would also have been admissible at a separate trial of the tax charge of each individual defendant, it is difficult to believe that their conviction on those charges was due in any part to the mere fact that the trial was joint. *Cf. Baker* v. *United States*, *supra*, 401 F.2d at 972-973; *United States* v. *Granello*, *supra*, 365 F.2d at 995.

We also reject appellants' contention that even if joinder were permissible under Rule 8, the trial court should have granted their Rule 14 motions for severance and separate trials.[42] As appellants recognize, such a motion calls for an exercise of the trial court's discretion, and the court's ruling is subject to reversal only when that discretion is abused. *United States* v. *De La Cruz Rellinger*, 422 F.2d 723 (9th Cir. 1970); *Tillman* v. *United States*, 406 F.2d 930 (5th Cir. 1969); *Parker* v. *United States*, 404 F.2d 1193, 1194 (9th Cir. 1968); *Troyer* v. *United States*, 375 F.2d 310 (D.C. Cir. 1966); *Fernandez* v. *United States*, 329 F.2d 899, 906 (9th Cir. 1964). We find no abuse of discretion here.

Appellants' basic contention is that the issues were so complex, the trial so lengthy, and the evidence admissible

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[42] Federal Rules of Criminal Procedure 14 states:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. . . ."

against only one or some of the four so voluminous and prejudicial, that the jury could not make a fair assessment of each individual defendant's guilt. But the story was simple—a half-dozen men, using various interstate facilities, cheated at cards at the Friars Club intermittently over a period of years. The factual issues were not complex—though the charges were fairly numerous, they were based upon only a few incidents. The extreme length of the trial was in large part because of the elaborate and exhaustive defense. The court carefully instructed the jury about the compartmentalization of the evidence as to each defendant. With only four defendants and relatively few critical factual incidents to consider, an exhaustive presentation by both sides over an extended period, and careful guidance by the court, we think the jury was competent to accord each appellant fair and impartial consideration.

Roselli, citing *de Luna v. United States*, 308 F.2d 140 (5th Cir. 1962), argues that severance was required because Friedman and Teitelbaum elected to testify while he did not. In that case, however, the defenses of the accused were antagonistic. The testifying defendant sought to establish that de Luna, and not he, had committed the crime, and his counsel commented unfavorably upon de Luna's failure to take the stand. The defenses of Friedman and Teitelbaum were not antagonistic to that of Roselli; indeed, Friedman's testimony tended to exculpate Roselli; and there was no comment from any quarter on Roselli's failure to testify.

V

Appellants argue that they were prejudiced by a variety of errors in the examination of witnesses and admission of evidence.

A. They complain that the jury was made aware that two witnesses subpoenaed by the Government (Gebhard and Snyder), and a defense witness under Government cross-examination (Lewin), declined to answer questions on the ground that their testimony might incriminate them. Appellants rely upon the two lines of reasoning outlined in *Namet* v. *United States*, 373 U.S. 179, 186 (1936):

> "First, some courts have indicated that error may be based upon a concept of prosecutorial misconduct, when the Government makes a *conscious* and *flagrant* attempt to build its case out of inferences arising from use of the testimonial privilege. . . . A second theory seems to rest upon the conclusion that, in the circumstances of a given case, inference from a witness' refusal to answer added *critical weight* to the prosecutor's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant." (Emphasis added.)

The incident involving Lewin merits only brief consideration. Both lines of reasoning discussed in *Namet* rest on the premise that the inference that the jury may draw from the witness' refusal to testify is of substantial importance to the Government's case. Lewin's testimony related only to a collateral issue of minor significance. The questions he refused to answer on cross-examination were directed to matters of impeachment, not issues in the case, and did not involve the defendants in any way. Even if the jury inferred that Lewin's answers would have incriminated him, the inference could have had only the most remote and indirect relevance to defendants' guilt.

Turning to Gebhard and Snyder, we first reject any suggestion of prosecutorial misconduct. Although the Govern-

ment was advised that both men would refuse to answer, the record negates any conscious effort by the Government "to build its case out of inference arising from use of the testimonial privilege."

Snyder was questioned before the jury because the court and counsel for both sides believed that he could not be punished for contempt unless he refused to answer in the regular course of the trial. He was asked and refused to answer but one question. The Government made no effort to exploit the incident.

Gebhard was never questioned before the jury. However, because he had been mentioned frequently in the testimony and had appeared in court for identification by other witnesses, the Government expressed concern that unless the jury was advised of the reason for his failure to testify it might infer that his testimony would have been adverse to the Government's case. Acting on the authority of *United States* v. *Romero*, 249 F.2d 371, 375 (2d Cir. 1957) (*see also United States* v. *Gernie*, 252 F.2d 664, 669 (2d Cir. 1958)), the court instructed the jury as indicated in the margin.[43] Thus, the prosecution's motivation was wholly

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[43] "The Court: Ladies and gentlemen of the jury, during the course of the case you have seen from time to time a man referred to as Pete Gebhard.

"Mr. Gebhard was called a witness. He refused to testify, and has, insofar as this case is concerned, retired from the courtroom.

"You are not to consider this fact in any connection whatsoever in your determination of the issues that will be presented before you. You are not to speculate as to what his testimony might have been had he testified one way or the other.

"I only mention this in order that you might not otherwise wonder why Mr. Gebhard, whom you have seen, has not testified. This was by his own determination, and it had nothing to do with the Government or any of the defendants. This was his own doing. So you will be governed accordingly."

defensive; there is nothing to support a charge that the Government sought to draw from Gebhard's silence an inference favorable to its case."[44]

Since we conclude that there was no prosecutorial misconduct, the question is whether, in the particular circumstances of this case, the inference that the jury may have drawn when Gebhard and Snyder refused to testify "added critical weight to the prosecutor's case in a form not subject to cross-examination." We think not.

There is no doubt that the matters to which Gebhard would have testified were vital, for it was the Government's theory that Gebhard acted as "peekman" after Seach's imprisonment, perhaps assisted on one occasion by Snyder. Nonetheless, we think it unlikely that the jury drew an inference from their silence that added "critical weight" to the Government's case. As we have noted, Gebhard was asked no questions in the presence of the jury. Snyder was asked a damaging question, but only one, and his potential as a witness appeared relatively limited. The Government had abundant evidence, albeit circumstantial, establishing the elements of the offense to which Gebhard's testimony might have related. The incidents were not calculated to impress the jury; the questioning of Snyder and the court's instruction regarding Gebhard occupy two or three pages in a transcript of over sixteen thousand pages—a few moments in a six-month trial. The jury was admonished, immediately and forcefully, that each witness' refusal was

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[44] In context, the remark in closing argument to which appellants point is simply a reference to the fact that evidence concerning the later period of the conspiracy was largely circumstantial.

of his own doing, and that no inference was to be drawn from it, one way or the other.[45]

We wish to add, however, that we do not approve the practice of questioning a witness before the jury after he has indicated that he will decline to testify, as Synder had, nor of advising the jury that a witness has refused to testify, as was done with Gebhard, when the defense had not sought to use the witness' silence to the Government's disadvantage. As Judge Hand said in *United States* v. *Maloney*, 262 F.2d 535, 537 (2d Cir. 1959), when a potential Government witness indicates that he will refuse to testify, the situation is one in which either advising the jury of this fact or not doing so "results in prejudice to one side or the other; and it is impossible, so far as we can see, to lay down any general rule that will cover all instances." Judge Hand concluded, however, and we agree, that unless and until the defense seeks to exploit the situation to its advantage, the balance must be struck in favor of the accused. On the other hand, "if the accused at any stage of the trial should argue that the failure to call such a witness indicated that

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[45] The cases relied upon by appellants are distinguishable. In *Fletcher* v. *United States*, 332 F.2d 724 (D.C. Cir. 1964), the prosecution was allowed to ask an alleged accomplice of the defendant seven leading questions that effectively described the crime. There were few witnesses and the trial was short (less than three days). The testimony sought would have corroborated that of the Government's only other witness. The trial judge's admonitory instruction was weak and confusing.

In *Robbins* v. *Small*, 371 F.2d 793 (1st Cir. 1967), the prosecution was allowed to ask the witness fourteen leading questions, including many extremely prejudicial to the defendant's case. In *Sanders* v. *United States*, 373 F.2d 735 (9th Cir. 1967), the witness was asked at least ten incriminating questions. *In United States* v. *Maloney*, 262 F.2d 535 (2d Cir. 1959), the trial court failed to give the admonitory instruction.

he would not support the charge, the prosecution should be free to disclose the fact that it had reason to suppose that the witness would refuse." *Id.*

B. Appellants suggest that the Government exceeded the admittedly broad scope of proper cross-examination in attempting to impeach the witnesses Lewin and Carson. If the Government pressed too hard, the error does not justify reversal. The purpose of Lewin's testimony, as we have just noted, was to impeach the Government witness Seach by contradicting Seach's testimony as to a fact collateral to the offenses charged. Carson was also called to impeach Seach by offering a lay opinion about Seach's mental health. Assuming that these witnesses were unfairly impeached so that their credibility was to some extent improperly diminished, reducing somewhat the tendency of their testimony to impeach Seach, in the context of this record the ultimate impact of the error upon the jury's determinations was surely de minimis.[46]

C. Appellants complain of the admission of testimony about their participation in other "peek" operations. Much of this evidence came in as proper redirect examination of Seach after appellants had opened the issue in cross-examination. Moreover, the evidence was relevant to the issues of intent, knowledge, and the existence of a continuing

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[46] We also reject under Rule 52(a) Teitelbaum's argument that it was error to require him to produce tape recordings of telephone conversations between himself and Government witness Mathes. Teitelbaum generally asserts that the tapes contain prejudicial material, pointing to nothing in particular. We have read a transcript of the tapes. They are liberally laced with protestations of innocence and exculpatory remarks by Teitelbaum, and include nothing we would regard as prejudicial to him.

"business enterprise" (*Cohen* v. *United States*, 378 F.2d 751, 758-759 (9th Cir. 1967); *Hernandez* v. *United States*, 370 F.2d 171, 172 (9th Cir. 1966)),[47] and we cannot say that the trial judge erred in the exercise of the wide discretion vested in him to determine whether its probative value exceeded its prejudicial effect. *United States* v. *Feldman*, 136 F.2d 394, 399 (2d Cir. 1943).[48]

D. Appellant Roselli moved before trial to suppress evidence obtained through Government-conducted electronic surveillance. On the Government's assurance that no fruits of the surveillance would be used at trial, the trial court elected to hold the suppression hearing after trial. Roselli claims it was error to refuse a pretrial hearing, that the hearing conducted was inadequate, and that the Government failed to establish that the evidence admitted at trial was free of taint. Essentially the same issues were decided against Roselli in *United States* v. *Filippo Sacco a/k/a John Roselli*, F.2d (9th Cir. June 17, 1970) (No. 24,217), and no argument raised on the present appeal has shaken our confidence in that decision.

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[47] Testimony concerning the so-called "Beverly Hills Hotel Incident" was also relevant to the question of when Teitelbaum first met Seach, which became important in connection with Teitelbaum's efforts to impeach Seach.

[48] Contrary to Teitelbaum's contention, we are satisfied that the jury understood from the trial judge's admonition that evidence regarding these "peek" operations was to be considered only against those defendants who were said to have participated in a particular operation.

We also reject Jacobs' argument regarding the testimony of cheating at the "Old" Friars Club. It was stricken as too remote and the jury was admonished to disregard it; and neither the cotent nor context suggests any reason for doubting the efficacy of these remedial steps.

E. We find no reversible error, if error at all, in the admission of the various documents to which Jacobs objected on the grounds that they were not properly authenticated, that a proper foundation was not laid, or that they were irrelevant or immaterial.

VI

We cannot agree with appellants that the Government's closing argument exceeded the bounds of proper advocacy to a significant degree, or contained language that might have been interpreted as a comment on the failure of Jacobs and Roselli to testify.

VII

Nor are appellants' objections to the instructions well taken.

The elements of the section 1952 offense were fully and correctly described; appellants' arguments to the contrary rest largely upon an interpretation of the statute that we have rejected. Their objections to the *Pinkerton* instruction also raise issues dealt with earlier in this opinion.

With one exception, the objections Friedman now makes to the section 2314 instructions were not raised below, and the one objection made to the trial judge led to a prompt and, in our view, entirely adequate corrective instruction. Reading the instructions as a whole, Friedman's argument that they deprived him of the benefit of the rule that guilt must be shown beyond a reasonable doubt approaches the frivolous.

Teitelbaum's objection to instructions to the effect that, once established, a defendant's membership in a conspiracy having continuity is presumed to continue until he demonstrates to the contrary, is without substance. *Hyde* v. *United States*, 225 U.S. 347, 369 (1912); *United States* v. *Goldberg*, 401 F.2d 644, 648 (2d Cir. 1968); *United States* v. *Borelli*, 336 F.2d 376, 388 (2d Cir. 1964).

Friedman's conviction on Count 19 is reversed. The judgments are otherwise affirmed.

APPENDIX B

Pertinent excerpt from the opinion in *United States* v. *Sacco*, 428 F.2d 264 (9th Cir. 1970).

8. *Wire-tapping.*

Defendant's final contentions relate to a post-conviction hearing as to whether any of the government's evidence was tainted by admittedly trespassory surveillance, and whether the defense should have been allowed additional discovery beyond the materials supplied by the government.

After a hearing, the trial court found that all existing evidence obtained by the government had been supplied to the court and the defendant and that none of that information had been used, or had furnished leads to information that had been used, at trial. The court also found that the original tapes had been routinely destroyed. Both the defendant's suppression motion and his discovery motion were denied.

The defendant's objections to those rulings seem to fall into two groups. First, he suggests that the trial court relied on an *in camera* inspection of materials that were unavailable to the defense, and that this procedure denied him due process and equal protection of the laws. The government asserted that the copy of the material derived from illegal surveillance that the government supplied to the defense was complete except for (1) the names of the persons who made the logs and (2) material not obtained from electronic surveillance that was "not in any way even remotely connected with this case." The trial judge did not say either in his order or at the hearing that he had

fully verified that assertion through *in camera* inspection of the unexcised copy supplied him. We are invited to do so.

These trial court proceedings were consonant with the Supreme Court opinion in Alderman v. United States, 1969, 394 U.S. 165, 180-187, 89 S.Ct. 961, 22 L.Ed. 2d 176. See also Desist v. United States, 1969, 394 U.S. 244, 246-247 n. 5, 89 S.Ct. 1030, 22 L.Ed.2d 248. The defendant's counsel were given an opportunity to examine the products of the surveillance for themselves in an adversary proceeding, and were unable to find any source of taint. See also Taglianetti v. United States, 1969, 394 U.S. 316, 317, 89 S.Ct. 1099, 1101, 22 L.Ed.2d 302:

> "Nothing in *Alderman* • • • requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance. • • • Here the defendant was entitled to see a transcript of his own conversations and nothing else. He had no right to rummage in government files."

The defendant's second objection concerns the timing of the hearing. Shortly before trial the defense was served with a "Memorandum Disclosing Electronic Surveillance" and representing both that the prosecutor had not had access to any of the information from the surveillance and that it had no "possible bearing on or relevance to" the defendant's prosecution. The government also represented that:

> "1. Its case in trial will not rely upon tainted evidence or any clues or leads derived therefrom and the Government will be able amply to demonstrate this at a posttrial hearing.

2. A pretrial hearing is likely to be of considerable duration, and the need for it would be obviated if defendant is acquitted.

3. At a pretrial hearing only a hypothetical or tentative case could be presented, and all questions and answers given at the trial could not be fully anticipated. Nor would the court be able to ascertain the constitutional purity of the Government's potential cross-examination of defense witnesses and defendant Sacco himself.

4. A pretrial hearing would inevitably amount to an unrestricted discovery of the Government's case.

5. A pretrial hearing in this case would probably attract extensive publicity and may prejudice defendant's right to a fair trial."

The trial judge denied the defense motions for a pretrial hearing on suppression and discovery motions relating to the electronic surveillance. Both inquiries were postponed until after trial. Before the hearing took place, a hearing on electronic surveillance in the related Friars Club case was held, and evidentiary portions of that hearing were made part of the record in this case by stipulation.

[11] Other district courts have granted motions to postpone suppression hearings until after trial. See, *e. g.*, United States v. Birrell, S.D.N.Y., 1967, 269 F.Supp. 716. Where there has been no hearing at all in the trial court because the surveillance first came to the attention of the defense after trial, the Supreme Court has repeatedly indicated that a post-trial hearing is the proper remedy. See Desist v. United States, *supra*, 394 U.S. at 246-247 n. 5, 89 S.Ct. 1030; Kolod v. United States, 390 U.S. 136, modified on rehearing *sub nom.* Alderman v. United States, *supra*,

394 U.S. 165, 89 S.Ct. 961; Hoffa v. United States, 1967, 387 U.S. 231, 233-234, 87 S.Ct. 1583, 18 L.Ed.2d 738. We hold that the decision of the trial judge as to the timing of the hearings was within his discretion, and not an abuse of it.

The defendant's counsel does not claim error in the denial of his post-trial discovery motion. Nor does he object to the district court's rulings on the scope of his cross-examination of the F.B.I. agent who was in charge of the "Rosselli file." We find no error.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1020

BENJAMIN TEITELBAUM, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1029

JOHN ROSELLI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1034

MANUEL JACOBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a six-month jury trial in the United States District Court for the Central District of California, petitioners were convicted of various offenses arising out of participation in an organized scheme to cheat for profit in card games played at the Friars Club in Beverly Hills, California. The essence of the scheme was to induce persons to join in high stake card games and, while the games were being played, to station observers at ceiling peepholes who transmitted playing instructions to confederates by way of electronic signalling devices.

Each petitioner was convicted of conspiracy to violate 18 U.S.C. 1952 (use of interstate facilities for unlawful gambling enterprise), 18 U.S.C. 2314 (interstate transportation of stolen securities) and 26 U.S.C. 7206(1) (filing a false income tax return by failing to report monies obtained from the scheme); each was also found guilty of at least one substantive violation of Section 1952, through use of the telephone and interstate travel, and of substantive violations of Section 2314 through transportation of checks obtained from the card games to and from Las Vegas (see Pet. No. 1020, App. 2). In February, 1969, Teitelbaum and Jacobs were sentenced to imprisonment for terms totalling four years and Roselli was sentenced to terms totalling five years; fines in varying amounts were also imposed. The court of appeals affirmed in a comprehensive opinion which sets forth the relevant facts and discusses in extensive detail the major contentions asserted by petitioners in this Court (Pet. No. 1020, App. 1-36). In the main, we rely upon that opinion; we believe it appropriate, how-

ever, to address ourselves to certain of the contentions raised by petitioners.[1]

1. Petitioners assert that the court of appeals erred in ruling that, in order to hold a defendant liable as a conspirator, it was not necessary for the government to show that he knew of or reasonably could be held to anticipate the interstate aspects of the agreement (Pet. No. 1020, App. 13-16); this, it is said, is contrary to the orthodox view that the federal element must be within the contemplation of the conspiracy.[2] *Pereira* v. *United States*, 347 U.S. 1, 11-12. The different analysis adopted below, however, does not warrant the granting of certiorari in view of the court's alternative ruling that the evidence was sufficient to show actual knowledge or reasonable contemplation that interstate facilities and interstate travel would be involved.[3] Indeed, this was the basis

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[1] The petition in No. 1034 (Jacobs) is out of time under Rule 22(2) of the Rules of this Court, having been filed 31 days after the denial of the petition for rehearing.

[2] But see our discussion in our Memorandum in Opposition in *United States* v. *Blassingame*, 427 F. 2d 329 (C.A. 2), petition for certiorari pending, No. 5562, involving the Second Circuit's view as to the proof necessary to make out an offense under the mail fraud statute (18 U.S.C. 1343). We are providing counsel for petitioners with a copy of our Memorandum in *Blassingame*.

[3] Although the court of appeals specifically dealt in detail with knowledge in this regard only as to petitioner Teitelbaum (Pet. No. 1020, App. 16-18), the court's opinion indicates, as the trial evidence shows, that the other petitioners were actually aware or could reasonably be presumed to be aware of the interstate elements of the agreement (see Pet. No. 1020, App. 21-22).

upon which the case was tried and the trial court's instructions unequivocally directed the jury that to convict on the conspiracy charges it had to find "knowledge" regarding the interstate aspects of the scheme.[4] This instruction complied with the principle stated in *Pereira* v. *United States*, 347 U.S. 1, 8-10; see also, *Nassif* v. *United States*, 370 F. 2d 147, 152-153 (C.A. 8); *United States* v. *Mingoia*, 424 F. 2d 710, 712 (C.A. 2); no conflict has thus been created which this Court should resolve.

2. The contention that the card cheating enterprise did not come within the proscription of Section 1952 because it was not a business enterprise involving gambling under California law was thoroughly canvassed and properly rejected by the court below (Pet. No. 1020, App. 3-9). We add that there is no reason to defer disposition of the instant petitions because of

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[4] The trial judge instructed on the conspiracy charge (count one) as follows (Tr. 703-704):

> With respect to [the conspiracy count] it is not sufficient for the Government to prove that one or more of the defendants agreed to participate in, or to become a member of, a conspiracy to cheat at cards at the Friars Club. That isn't enough. Before a defendant may be found guilty of Count One of the indictment, the Government must prove that such defendant specifically agreed to the use of illegal interstate facilities, or directly agreed to a scheme which could not be consummated without the use of illegal interstate transportation or facilities, or agreed to a scheme in which it was shown that the likelihood of the use of illegal interstate transportation or facilities was great, * * * or that he evidenced his indirect agreement by substantial participation in the scheme with actual knowledge of the proposed or completed use of illegal transportation or facilities.

the grants of certiorari in *Perez* v. *United States* or *Rewis* v. *United States*, Nos. 600 and 5342 respectively, this Term. *Perez* deals with a totally different statutory scheme where Congress sought by formal findings to avoid the requirement of proof in each individual case that there had been an effect on commerce; *Rewis* involves the entirely different issue of whether, in the particular circumstances of that case, petitioners induced the interstate travel of others to a gambling establishment. Nor is *United States* v. *Nardello*, 393 U.S. 286, inconsistent with the ruling below (Pet. No. 1029, pp. 11-12). Indeed, in *Nardello*, this Court cut through form to substance to give the statutory provision its intended reach.

3. The other individual claims of the petitioners are also fully treated in the opinion below and justify but summary comment.

a. The government introduced telephone toll records reflecting interstate calls between petitioner Jacobs' residence in Los Angeles and locations of other members of the conspiracy during its pendency. In view of the other evidence of record tying Jacobs to the conspiracy, the court below concluded that the jury was properly permitted to consider that the calls were made by Jacobs and related to the conspiracy (Pet. No. 1020, App. 22-23). Petitioner Jacobs now contends that the admission of the toll records violated Section 605 of the Federal Communications Act (47 U.S.C. 605). The decisions are, however, uniformly to the contrary. *United States* v. *Covello*, 410 F. 2d 536, 540-542 (C.A. 2) and cases cited, certiorari denied, 396 U.S. 879; see also *Nolan* v. *United*

States, 423 F. 2d 1031, 1043-1045 (C.A. 10); *DiPiazza* v. *United States*, 415 F. 2d 99, 101-103 (C.A. 6), pending on petition for a writ of certiorari, No. 67, this Term.

The cases from the Ninth Circuit relied on by petitioner (*United States* v. *Johnson*, 429 F. 2d 430, and *Osborne* v. *United States*, 371 F. 2d 913) do not deal with Section 605 but with the argument, properly rejected below, that there was insufficient evidence to identify the caller or recipient.[5]

b. Petitioner Roselli contends (Pet. No. 1029, pp. 15-17) that the district court erred in deferring, until after the trial, the hearing on his motion to suppress evidence on grounds of illegal electronic surveillance; he also argues that there were various infirmities in the hearing on that issue. In rejecting this claim, the court of appeals relied on its prior decision (set forth in pertinent part in Pet. No. 1029, 51a-54a) involving a separate conviction of petitioner in which it rejected essentially the same claims (Pet. No. 1029, p. 47a). In a recent case identical arguments were rejected by the Ninth Circuit and this Court denied certiorari. *United States* v. *Sacco*, 428 F. 2d 264, 272-274 (C.A. 9), certiorari denied, November 9, 1970 (No. 556, this Term).

c. Petitioner Teitelbaum's claims of error (Pet. No. 1020, pp. 25-43) regarding government cross-examination of certain of his witnesses are amply

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[5] Jacobs' claim of prejudicial joinder (Pet. No. 1034, 10-18) is fully answered by the court below (Pet. No. 1020, App. 25-31) and requires no discussion here.

answered below. It is further claimed that the jury was improperly informed of the fact that two witnesses subpoenaed by the government had claimed the privilege against self-incrimination. As the court below stressed, there is not the slightest evidence of a prosecutorial attempt to build its case in this fashion or of prosecutorial misconduct. The court below disapproved, as a general matter, questioning a witness before the jury after he claims the privilege or advising the jury of a claim asserted outside its presence. It found, however, no reversible error in the circumstances of this case (see Pet. No. 1020, App. 31-34). This assessment of a particular factual context should provide no occasion for plenary review.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

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